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Supreme Court of the United States

OCTOBER TERM, 1958

No. 60

ABRAM FLAXER, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 29, 1958
CERTIORARI GRANTED JUNE 9, 1958

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,027

ABRAM FLAXER, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court
for the District of Columbia

JOINT APPENDIX

I.

PLEADINGS, DOCKET ENTRIES AND OTHER PAPERS

242 UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Filed in Open Court Nov. 20, 1952

Holding a Criminal Term

Grand Jury Impanelled Nov. 3, 1952, Sworn in on Nov. 4, 1952.

Criminal No. 1756-52

Grand Jury Original (2 U.S.C. 192)

UNITED STATES OF AMERICA

v.

ABRAM FLAXER

The Grand Jury charges:

Introduction

On October 5, 1951, in the District of Columbia, the duly authorized Subcommittee on Internal Security of the Committee on the Judiciary of the United States Senate was conducting hearings, pursuant to Senate Resolution 366, 81st Congress, 2nd Session.

Defendant, Abram Flaxer, was duly summoned as a witness by the authority of the United States Senate of the Congress of the United States, through its aforesaid Subcommittee, to appear and produce before the said Subcommittee, on October 5, 1951, certain records upon the matter under inquiry before the said Subcommittee, that is, to produce records, among others of the United Public Workers of America, showing (1) names and addresses for all members who are employed by the Federal Government of the United States of America; and (2) names and addresses of all members who are employed by any state, county, or

municipal government located anywhere within the United States of America.

COUNT ONE

Defendant Flaxer appeared before the said Subcommittee on October 5, 1951, in the District of Columbia, but wilfully failed and refused to produce the records called for in part (1) of the aforesaid subpoena, and thereby wilfully did make default.

COUNT TWO

Defendant Flaxer appeared before the said Subcommittee on October 5, 1951, in the District of Columbia,
243 but wilfully failed and refused to produce the records called for in part (2) of the aforesaid subpoena, and thereby wilfully did make default.

CHARLES M. IRELAN
Attorney of the United States in and for the District of Columbia

A TRUE BILL:

(Signature illegible)
Foreman.

245 Filed Dec. 19, 1952

Motion to Dismiss Indictment

The defendant by his attorneys moves that the indictment and each and all of the counts thereof be dismissed on the following grounds:

1. The indictment does not state facts sufficient to constitute an offense against the United States.

2. The indictment is vague and indefinite and fails to inform the defendant adequately of the offense charged.

3. It was beyond the power and jurisdiction of the Subcommittee on Internal Security to demand the records re-

ferred to in the indictment, and the defendant was under no legal duty to obey the summons to produce such records.

4. The indictment was not found by a sufficient number of qualified grand jurors, because fourteen out of the twenty-three members of the grand jury were government employees.

5. The indictment alleges, to the prejudice of the defendant, one offense in two counts. If the indictment is not dismissed on this ground, the defendant moves that the United States be required to elect to try only one of the counts.

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247 Filed Dec. 19, 1952

Motion for a Hearing on the Qualifications of the Grand Jury

The defendant by his attorneys moves that a hearing be held to determine which grand jurors were not qualified to serve for the purpose of finding the indictment herein.

In support hereof, the defendant states that the list of the grand jurors in the clerk's office shows that fourteen out of twenty-three members of the Grand Jury which indicted the defendant were employees of the United States government; that other members of the Grand Jury may well have been applicants for government employment or may have government employees in their immediate family.

The hearing on the qualifications of the grand jurors is requested so that the defendant may produce evidence at such hearing that government employees as a class may not properly sit as grand jurors to return the indictment herein because governmental pressures relating to the loyalty and security of government employees prevent such employees from being or appearing to be unbiased in defendant's case.

In addition, the defendant wishes to have an opportunity to examine each of the government employees who sat on the grand jury, with respect to the influence upon such juror of the loyalty and security programs of the govern-

ment, in the light of the nature of this case, and to prove as a result of such questioning the existence of actual bias on the part of the said grand jurors against the defendant.

248 In further support of this motion, defendant files herewith an offer of what he will prove at the requested hearing.

• • • • • • • • • • •

249 Filed Dec. 19, 1952

Offer of Proof in Connection With Motion for a Hearing on the Qualifications of the Grand Jurors

The defendant, in support of his motion for a hearing on the qualifications of the grand jurors who indicted him, offers to prove at such a hearing that governmental pressures and the climate of opinion among government employees prevent them as a class from being or appearing to be impartial and unbiased grand jurors in the defendant's case. Among the evidence which the defendant will adduce for this purpose are the following:

A. The grand jurors had before them at the time of their deliberations the hearings before the Senate Subcommittee on Internal Security which resulted in the citation of the defendant for contempt. These hearings indicated to the grand jurors that the Senate Committee was conducting its own investigation into the loyalty and security of government employees. These hearings also show that the records which the Subcommittee subpoenaed from the defendant were purportedly in aid of such investigation. Thus, the failure of the grand jurors to indict the defendant would have appeared to be an attack upon and an obstruction to the functioning of a loyalty investigation. Under these circumstances, a government employee on the grand jury could not have voted in favor of the defendant without subjecting himself to investigation and suspicion, and, moreover, the government employees on the grand jury must have so believed.

B. Government employees who have been attacked and accused of alleged disloyalty by Congressional figures, including Senator McCarthy and Senator McCarran, have been constantly harassed and subjected to abuse and threats, and their positions have been jeopardized. Government employees have been forced to resign because of these charges, and one who had been frequently attacked by both Senator McCarthy and McCarran was discharged after having been twice cleared by loyalty boards of his agency.

C. In a number of previous cases allegedly involving the security of the government, judges and jurors have been attacked by members of Congress and other government officials whenever such judges or jurors took any action that displeased these Congressmen. In one case, Judge D. E. Metzger of Hawaii was denied reappointment as a judge because he fixed bail for a group of defendants at a sum far lower than that recommended by the Department of Justice.

D. As a result of such incidents and many others involving the operation of the loyalty and security programs of the government, there exists among government employees and their families, as numerous and competently qualified observers can testify, a climate of fear of being charged with disloyalty on account of opinions, beliefs, associations and actions, which inevitably influences the vote of a government employee serving as a juror in a case such as the defendant's. See e.g., Barth, The Loyalty of Free Men; Jahoda and Cook, Security Measures and Freedom of Thought: An Exploratory Study of the Impact of Loyalty and Security Programs (1952) 61 Yale L. J. 295; Brown, 6,000,000 Second Class Citizens, The Nation, June 28, 1952, Vol. 174, p. 644.

E. Under the standards and practice of the loyalty and security programs of the government it would be almost

inevitable that loyalty and security boards would take into account how government employees and members of their families sitting as grand jurors in the defendant's case voted.

F. Even if loyalty and security boards would not take such matters into account, government employees and their families believe, and have reason to believe, that loyalty and security boards and loyalty and security investigations would take into consideration how they voted as grand jurors in the defendant's case.

G. The Federal Bureau of Investigation has taken into account, in investigating the loyalty of private citizens, that they testified for defendants in a prosecution
251 for contempt of a Congressional Committee under the same statute under which the defendant's indictment is based. See United States v. Judith Coplon, Crim. No. 381-49, in this Court, pp. 5244-5245 of stenographic transcript of record.

H. The discipline and environment which condition and surround government employees, the expressed opinions of high government officials, and the policies government employees carry out, create in such employees as a class a predisposition which prevents them as a class from being, or appearing to be, impartial grand jurors in a case such as defendant's.

I. The government employees who voted to indict the defendant were, because of the pressures and climate and the other factors described, unfair and biased grand jurors in the defendant's case.

J. If the hearing is granted, we expect to call the following witnesses among others to establish the above facts: officials administering the loyalty and security programs of the government, Alan Barth of the Washington Post,

Professor Ralph Brown of Yale Law School, and Professors Jahoda and Cook of New York University.

• • • • • • • • • • • •

253 Filed Jan. 16, 1953

Order Denying Motion for Hearing on Qualifications of the Grand Jury

On this 16th day of January, 1953, came the attorney of the United States; the defendant by his attorneys, David Rein and Vito Marcantonio, Esquire; whereupon the defendant's motion to dismiss indictment and defendant's motion for bill of particulars, coming on to be heard, after argument by counsel, is by the Court submitted; thereupon the defendant's motion for a hearing on the qualification of the Grand Jury, coming on to be heard, is by the Court denied.

By direction of

WALTER M. BASTIAN, J.
Presiding Judge
Criminal Court # 4

• • • • • • • • • • • •

254 Filed Feb. 10, 1953

Memorandum of Court

This case is before the Court on defendant's motion to dismiss the indictment.

The indictment is under Title 2 United States Code, Section 192, which reads as follows:

"Refusal of witness to testify. Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent

to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months. As amended June 22, 1938, c. 594, 52 Stat. 942."

The indictment is in two counts and in it is alleged the following:

"Defendant, Abram Flaxer, was duly summoned as a witness by the authority of the United States Senate of the Congress of the United States, through its aforesaid Subcommittee, to appear and produce before the said Subcommittee, on October 5, 1951, certain records upon the matter under inquiry before the said Subcommittee, that is, to produce records, among others of the United Public Workers of America, showing (1) names and addresses for all members who are employed by the Federal Government of the United States of America; and (2) names and addresses of all members who are employed by any state, county, or municipal government located anywhere within the United States of America."

255 The indictment then continues:

"Count One. Defendant Flaxer appeared before the said Subcommittee on October 5, 1951, in the District of Columbia, but wilfully failed and refused to produce the records called for in part (1) of the aforesaid subpoena, and thereby wilfully did make default.

"Count Two. Defendant Flaxer appeared before the said Subcommittee on October 5, 1951, in the District of Columbia, but wilfully failed and refused to produce the records called for in part (2) of the aforesaid subpoena, and thereby wilfully did make default."

The attack on the indictment is based on five grounds, only one of which seems important enough to justify discussion. Paragraph 1 of the motion to dismiss urges that

the indictment does not state facts sufficient to constitute an offense against the United States, and this is the point to which this memorandum is directed.

Of course, if the indictment fails to state an essential element of the crime, it may not stand. The point contended for here is that the indictment fails in that it does not state that the defendant had possession of or control over the documents asked for in the subpoena—whether the indictment sufficiently states and apprises the defendant of the crime with which he is accused.

The defendant presents in support of his contention nothing which bears directly on this specific point. He cites the case of United States v. Fields, 6 F.R.D. 203, wherein Judge Holtzoff states, at p. 204:

"It [the indictment] finally averred that the defendant failed and refused to produce these papers and documents, although they were available to him and he could have produced them. It is charged that he thereby wilfully made default. The indictment fully apprises the defendant of the specific charge which he is called upon to meet."

The foregoing is a portion of a memorandum opinion upon the defendant's motion to dismiss on the ground that the indictment was insufficient.

It is to be noted, however, that the opinion does not go into the question of what elements constitute a valid indictment, but solely deals with sufficiency of the indictment then at hand.

256 Defendant also cites as authority the case of United States v. Fleishman, 339 U.S. 349, 374, 375. In that case, defendant was a member of the executive board of an association which was under investigation by Congress. Defendant was charged, jointly with other members of the executive board, with failing to respond to a subpoena to produce records of the association. The Supreme Court reversed the Court of Appeals, which had reversed the District Court's verdict of guilty. The ques-

tion of sufficiency of the indictment on the ground that it failed to allege that the defendant had the documents in his control was not raised, inasmuch as the indictment averred that fact. It is the dissenting opinion of Justice Black upon which the defendant here relies. The portion pertinent therein is as follows:

"Power to produce is an essential ingredient of any offense under R. S. Sec. 102, and the indictment necessarily alleged that 'each and all' of the board members had such power."

Again it is to be noted that the point raised in that case is not the same point raised in the present case.

The rest of the cases cited by the defendant are to the effect that an indictment is not sufficient unless it sets forth the essential elements of the offense charged.

It is the contention of the Government that the indictment herein involved does set forth the essential elements of the offense charged. The Government contends that the incorporation into the indictment of the word "willfully", as set forth in the statute, meets the requirement that the indictment state the essential elements of the crime.

Rule 7(c) of the Federal Rules of Criminal Procedure provides that the indictment shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.

" . . . The test is whether the defendant, by this indictment, is apprised of the charge which he is called upon to answer and also whether the accusation is so set forth that if he is placed in jeopardy by this indictment, he would be
257 in a position successfully to interpose a plea of double jeopardy if an attempt is made to try him again on the same charge." (Holtzoff, J. in United States v. Fields, supra.)

The Government contends that the indictment fully meets the requirements of this test. To support this con-

tention they cite the case of Fields v. United States, 82 U. S. App. D. C. 354, 164 F. (2d) 97, wherein the Court defines "willful" as "deliberate and intentional and . . . not a mere inadvertence or an accident." If one were to substitute the words "deliberately and intentionally" for the word "willfully", so as to make the indictment read:

"Defendant Flaxer appeared before the said Subcommittee on October 5, 1951, in the District of Columbia, but [deliberately and intentionally] failed and refused to produce the records called for in part (1) of the aforesaid subpoena, and thereby [deliberately and intentionally] did make default."

the implication becomes clear that the defendant could have produced the records called for, if he had so desired.

Funk and Wagnalls New Standard Dictionary (1951) gives the meaning of "deliberate" as "formed after careful consideration, entered upon after deliberation and with fixed purpose"; and the meaning of the word "intentional" is set forth as "a settled direction of the mind toward the accomplishment of a particular act; that upon which mind is set." Therefore, it becomes somewhat apparent that employment of the word "willfully" in the indictment implied that the defendant had the documents in his control for, if he did not, he could not have refused to produce them intentionally and deliberately.

In the case of United States v. Kamp, tried here in the District of Columbia, a demurrer to the indictment urged that a literal reading of the subpoena, which was incorporated in the indictment, conveyed a meaning which could have been interpreted as directing the Sergeant at Arms, rather than the defendant, to produce certain documents. Judge Morris, in a memorandum, stated:

258 "Words are used only for the purpose of conveying a meaning. Where the meaning of the person using the words is thoroughly understood by the person

intended to understand them, it would be artificial to the extreme for the court to assume a different meaning."

On appeal, the lower court was affirmed. Kamp v. United States, 84 U. S. App. D. C. 187, the Court stating in its decision:

". . . In our day it is the idea conveyed that counts."

The Court has considered the other points raised by the motion to dismiss but finds them without merit.

The motion to dismiss is overruled.

WALTER M. BASTIAN
Judge

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260 Filed Mar. 30, 1953

Motion for New Trial

The defendant moves the Court to grant him a new trial for the following reasons:

1. The Court erred in denying defendant's motion for judgment of acquittal made at the conclusion of the evidence.

2. The verdict is contrary to the weight of the evidence.

3. The verdict is not supported by the evidence.

4. The Court erred in admitting evidence that the defendant failed to produce records after October 5th and in refusing to instruct the jury that it should not consider such evidence.

5. The Court erred in reading to the jury the language of S. Res. 366, 81st Congress, 2d Session. The reading of this language was not necessary for the charge and served to prejudice the jury.

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261 Filed June 5, 1953

Opinion

Two motions are before the court. One seeks a judgment of acquittal under Rule 29(b) of the Federal Rules of Criminal Procedure. The other, by way of alternative relief, seeks a new trial.

The defendant, president of a union known as the United Public Workers, was summoned by a congressional subcommittee to appear on October 5, 1951 to testify and to produce certain records relative to the subject matters under consideration by the subcommittee.[1] He appeared but failed to comply with the command of the subpoena to bring union records showing the names and addresses of members (1) employed by the United States Government and (2) employed by any state, county or municipal government within the United States.

In its report to the Senate the subcommittee indicated that the defendant's illegal refusal to comply with the subpoena duces tecum deprived the subcommittee of information pertinent to the subject matter committed to it for investigation and "places this witness in contempt of the United States Senate."[2] The Senate directed certification

262 of the subcommittee's report to the United States Attorney for the District of Columbia "to the end that said Abram Flaxer may be proceeded against in the manner and form provided by law."[3]

Thereafter the defendant was charged in a two count indictment with contempt[4] in that he failed on October 5,

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[1] Senate Resolution 366, 81st Congress, second session, created this subcommittee known as the subcommittee on Internal Security of the Committee on the Judiciary of the United States Senate to investigate the extent, nature and effects of subversive activities in this country by persons under the dominaion of the foreign government or organizations controlling the world communist movement or any other movement seeking to overthrow the Government of the United States by force and violence, and kindred matters.

[2] Report No. 1336, 82d Congress, 2d session.

[3] S. Res. 295, 82d Congress, 2d session.

[4] Violation of Title 2, Sec. 192, U.S.C., providing as follows: "Every person who having been summoned as a witness by the authority of either House

1951 to produce the specified union records and had thereby willfully made default. The jury returned a verdict of guilty as to both counts.

The motion for a judgment of acquittal is based on two main contentions. The first is that although the subpoena directed the production on October 5, 1951 of the records, the defendant appeared on that day without them and was given ten days additional time to produce them by the one member of the subcommittee who was present at the hearing, and hence that no default occurred on October 5, 1951.

The court finds no merit in the contention that the subcommittee granted an extension of time within which to comply with the subpoena. The defendant was clearly informed that he was to produce the records according to the terms of the subpoena, as is shown by the following:

"Mr. Arens. Mr. Chairman, I respectfully ask of the chairman that the witness be ordered to produce for this record, in compliance with the subpoena duces tecum served upon him, the record of the United Public Workers
263 showing the names and addresses of all members of the United Public Workers who are employed by the Federal Government of the United States of America, and records showing the names and addresses of all members who are employed by any State, county, or municipal government located anywhere in the United States of America. • • •

Senator Watkins. Do you stand on your statement that you refuse to produce those?

Mr. Flaxer. I didn't say I refused • • •

Mr. Arens. But you do have the information?

Mr. Flaxer. In a general sense, I think I have the information.

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of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default • • • shall be deemed guilty of a misdemeanor • • •."

Mr. Arens. And you have not complied with the command of the subpoena to produce that information.

Mr. Flaxer. I think it is an improper command, sir.

Senator Watkins. That is the reason you have refused to bring them here today, because you think it is improper?

Mr. Flaxer. That is the reason I haven't got them.

Senator Watkins. That is the main reason. You are directed by the committee to produce those records according to the terms of the subpoena. * * *"

It appears to the court that the offense of contempt was complete at this point. The defendant had been duly summoned to appear before the subcommittee and to bring with him the specified records and the offense of contempt matured when he willfully failed to comply on the return date of the subpoena. U. S. v. Bryan, 339 U. S. 323, 330, 341. The defendant often iterated his view that the subcommittee had no right to the union membership lists but consistently his view was rejected by the subcommittee. The following statement in Bart v. U. S., 203 F. 2d 45 at page 49 is applicable here:

"A witness does not insulate himself from contempt by asserting a reason for a refusal to answer, or by objecting to the question, or by querying its propriety. When he deliberately and intentionally refuses to answer upon a stated ground, he assumes the risk that the ground is unsound."

264 The subcommittee's subsequent command to defendant to produce the information sought within ten days was a new order, the validity of which need not now be considered.[5] Had the defendant respected the new

[5] The new order came about October 5, 1951—after the refusal indicated in the quoted portion of the hearing. The following took place concerning the new order:

"Mr. Arens. How long would it take you, Mr. Flaxer, to prepare the information which is called for in this subpoena?

Mr. Flaxer. I don't know.

Mr. Arens: Could it be done in a week?

Mr. Flaxer. I imagine it could be done in a week.

order he probably would not have been cited for contempt for failure to comply with the subpoena on October 5, 1951 albeit such failure on that day made out a case of willful default.

The other main contention of the defendant concerns a quorum. The setting in which the quorum query arises will first be given. After the defendant was sworn as a witness he said: "I notice that we do not have a quorum of the committee here." When told by Senator Watkins that "one present makes a quorum" the defendant responded: "I am not sure about that. I would like to
265 have the record show that I object to the fact that I think there is no quorum."

The subcommittee had as members seven senators. The resolution creating the subcommittee declares that a quorum for the transaction of business is a majority of its members except that a lesser number to be fixed by the subcommittee shall constitute a quorum for the purpose of

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Mr. Arens. I respectfully suggest to the chairman that the witness be ordered to produce the information and transmit it to the subcommittee in 10 days' time.

Senator Watkins. Since you have made the reply that it could be done in a week, that will be the order of the committee, that you submit that information as requested by counsel for the committee within 10 days from this date. The record will show that you of course have been given that notice and that requirement has been made, and the order has been made.

Mr. Flaxer: I would like to suggest to the committee to reconsider that. * * *

Senator Watkins. Whatever your argument is, that is the order now, and, as I understand it, you refuse to do so on the ground you set forth. I want to make the record clear.

Mr. Flaxer. I haven't got them. I don't feel capable of producing them.

Senator Watkins. You said you could do it within a week.

Mr. Flaxer. No; that was not the question he asked. He asked could the list be compiled within a week and I said it could.

Mr. Arens. The information is available to you?

Mr. Flaxer. Yes.

Mr. Arens: But you have declined to produce it; is that correct?

Mr. Flaxer. I haven't produced them.

Mr. Arens. Will you produce it pursuant to the order of the chairman of this session within 10 days from today?

Mr. Flaxer. I will have to take that under consideration.

Senator Watkins. That is the order, and of course we will have to take whatever steps are necessary if at the end of the time you have not produced them.

administering oaths and taking testimony.[6] That lesser number was fixed by the subcommittee for the purpose stated to consist of one Senator of the subcommittee.[7]

The defendant takes the position that only a subcommittee consisting of at least a majority of its members possesses the power to rule on his objections to the production of the records named in the subpoena; that therefore the purported adverse ruling on them by the one-man subcommittee was a nullity, and that since the objections were "never passed on in any way" by a subcommittee validly constituted for that purpose a judgment of acquittal should be entered.

Before the one-man subcommittee the defendant did not state that he would produce the records if a majority of the members of the subcommittee were present to rule on his objections. It is perfectly plain from his testimony at the hearing that he would not have complied with the subpoena no matter how many members of the subcommittee had been present. There he grounded his objections to producing the documents on "the rights of unions to
266 the privacy of their membership records" and he insisted that the command of the subpoena "constitutes a wholesale invasion of such privacy and 'the right to be let alone' which is protected by the fourth amendment" and is "in conflict with the basic union tradition of this country now incorporated into Federal law".

The defendant did not have the right to withhold the records. The command for their production was proper in view of the subject matter entrusted to the subcommittee for investigation. It is common knowledge that communists contemplate acquiring a powerful leverage on the

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[6] Sec. 2, S. Res. 366, 81st Congress, second session, reading as follows: "A majority of the members of the committee, or duly authorized subcommittee thereof, shall constitute a quorum for the transaction of business, except that a lesser number, to be fixed by the committee, or by such subcommittee, shall constitute a quorum for the purpose of administering oaths and taking sworn testimony."

[7] Minutes of meeting of subcommittee on January 18, 1951.

population by the undercover capture of control of strategic labor unions meanwhile concealing the communist tie from the union membership. In other words the grounds stated at the hearing by the defendant for his refusal to produce the records are unsound and at the trial he completely abandoned them.

Is is true as already indicated that the defendant mentioned the matter of a quorum at the hearing. That was at its start and previous to any mention of the records. What the defendant said did not apprise the subcommittee that he deemed essential a quorum of a majority of its members to hear and pass upon his objections to the subpoena. Apparently the defendant did not consider the alleged quorum defect of any importance for he definitely stated and relied on other grounds for his refusal to produce the records, the grounds not being tenable. Moreover, the defendant did not bring on October 5 the membership lists subpoenaed, and therefore, he put himself in a position where he could not comply in any event. In the opinion of the court the defense of lack of a quorum (if there was such a lack) is not available to the defendant under the circumstances of this case. U. S. v. Bryan, 339 U. S. 323.

It is ironic that of defendant's two main contentions for a judgment of acquittal one is grounded on the power, the other on the lack of power, of the one-man subcommittee to perform a function other than taking testimony. On the one hand defendant asserts that the one-man subcommittee had power to alter the terms of the subpoena by enlarging the return date. On the other hand he states the subcommittee did not have the power to pass on objections to that subpoena.

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In support of the motion for a new trial the defendant says that in instructing the jury it was error for the court to state the subjects committed to the subcommittee for investigation. Specifically, the defendant objects to the

mention of communist activities. There is no substance to this contention. In numerous inquiries of the jury on the voir dire the counsel for defendant indicated that the case touched on communism.

The motions are denied.

BURNITA SHELTON MATTHEWS
Judge

June 5, 1953.

* * * * * * * * * * *

268 Filed Oct. 19, 1953

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 1756-52

UNITED STATES OF AMERICA

v.

ABRAM FLAXER

Judgment and Commitment

On this 16th day of October, 1953 came the attorney for the government and the defendant appeared in person and[1] by his counsel, David Rein, Esquire and Vito Marcantonio, Esquire.

It Is Adjudged that the defendant has been convicted upon his plea of[2] not guilty and a verdict of guilty of the offense of Violation of Title 2, Section 192; U. S. Code as charged[3] and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized

representative for imprisonment for a period of[4] Two (2) Months and to pay a fine of One Thousand ($1,000.00) Dollars.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

BURNITA SHELTON MATTHEWS,
United States District Judge.

. . . . . .

II.

EXCERPTS FROM TESTIMONY AND PROCEEDINGS

3 PROCEEDINGS

The Deputy Clerk: Case of United States versus Abram Flaxer.

. . . . . .

Mr. Marcantonio: Just for the record, at this time we make objection to the presence of Government employees both on the grand jury and on the panel.

Mr. Rein: We would like to renew, in addition to the objection to the petit jury, the offer of proof which we already made in connection with the grand jury, which has already been ruled upon.

The Court: Very well.

. . . . . .

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[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel, and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3] Insert "in count(s) number " if required. [4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively, and if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5] Enter any order with respect to suspension and probation. [6] For use of Court wishing to recommend a particular institution.

6 Mr. Rein: Has Your Honor ruled on our objection to the Government employees being on the jury?

The Court: Yes, unless you have some prejudice of some kind to show other than just the fact that they are.

Mr. Rein: We presented, and I think in the motion we argued before you originally and then before Judge Bastian, an offer of proof in connection with Government employees on the grand jury. We would just present the same thing we had presented there, and nothing more.

The Court: That has been ruled on.

Mr. Rein: That has been ruled on with regard to the grand jury.

7 The Court: Then I will deny your motion. Of course, if anything develops in the course of this examination, you can make your motion.

Mr. Hitz: Your Honor, I have a legal question I could put to the Court at the bench. That might save some time. I will have to do it eventually.

The Court: Very well.

Mr. Hitz: As Your Honor knows one of the elements the Government has to prove is that the inquiry or the papers in this case, the papers that were sought by the committee were pertinent to the purposes of the committee.

As the Court well knows, that is a matter for the Court to determine and instruct the jury on—the conclusion that you reach—and it is not a jury question at all.

For that reason, I would like to know the procedures the Court will adopt so that I will be able to either include such statements in my remarks to the jury in the opening statement or to eliminate them, if the Court is going to hear that testimony separately.

Sometimes, as you know, the Court will hear that out of the presence of the jury and instruct on the conclusion. Some courts let it all go to the jury and then you make your own decision, but they nevertheless hear it.

Mr. Marcantonio: May I be heard on that point?

The Court: Yes.

8 Mr. Marcantonio: If Your Honor pleases, the situation here is such that in order to prevent bias or possibility of mistrial the questions should be asked outside of the presence of the jury. The questions might involve matters of alleged subversive activities, and that would be prejudicial to the defendant. It is for that reason that we strongly urge that the issue of pertinency be deliberated, or testimony on that question be taken outside of the presence of the jury.

The Court: You have no objection?

Mr. Hitz: No. I think if it is objected to, as they do, it ought to be done that way.

The Court: Very well.

. . . . . .

13 Mr. Marcantonio: May it please Your Honor, ladies and gentlemen of the panel, I am going to ask you to follow my questions because of the nature of the case. The case arose as the result of proceedings brought by the United States Senate. So I ask you this question: Does any member of the panel know any United States Senator?

. . . . . .

16 Mr. Marcantonio: Would you follow Her Honor's instructions that you cannot find the defendant guilty unless you are absolutely convinced of his guilt beyond a reasonable doubt? Does anybody feel he could not follow that instruction?

. . . . . .

17 Mr. Marcantonio:

. . . . . .

18 Now we come to the question: Has any member of the panel ever been employed or is now employed by the Government of the United States?

(There was a showing of hands among the panels.)

All right, thank you.

Is anybody here employed by the Federal Bureau of Investigation, or by the Department of Justice, in any capacity?

Now I am going to put my question to the Government employees: Would your employment by the Government cause you to be influenced in any way to the Government's side of this case as against this defendant? In this case the United States of America is one of the parties. Would any of you be influenced against the defendant because of your employment by the government?

Do any of you feel that a verdict of not guilty—

The Court: Mr. Marcantonio, you are lowering your voice and getting further down that way. It is difficult for the reporter to hear you.

Mr. Marcantonio: Would any of you feel that a verdict of not guilty in this case, if you honestly felt that a verdict of not guilty should be rendered, would you feel that rendering such a verdict placed your job in jeopardy?

Would any of you feel that rendering such a verdict would reflect upon you among your co-workers, or
19 affect your standing in your job or your chance of promotion in the department in which you are employed?

Would the fact that there may appear against this defendant witnesses who are employees of the Senate in any way mitigate against him, in your mind?

The Court: Mr. Marcantonio, I don't think that question is clear.

Mr. Marcantonio: Would that prejudice you against the defendant—the fact that some of the witnesses against him are either United States Senators or members of the Senate committee, or employees of the committee or of the Senate?

Have any of you ever had any contact with the Federal Bureau of Investigation?

Prospective Juror Canty: Well, you mean—

Mr. Marcantonio: Outside of your acquaintances.

Prospective Juror Canty: I used to work there.

Mr. Marcantonio: Would the fact that you are working for the Government, would that incline you towards the Government side of the case? Does any one of you feel that way? Do any of you feel that you would be in any manner embarrassed in your employment if you rendered a verdict of not guilty?

Do any of you believe that you may be called upon to explain your verdict by any superior in your office or your employee?

You are all familiar with the loyalty order program of the government. Do you feel that a verdict of not guilty would in any manner affect your employment status under that loyalty program? Do you have any fear in that regard?

Do you believe that a verdict of not guilty would embarrass you because of the loyalty tests to which Government employees have been subjected?

Do you feel that because you have taken a loyalty test that that in any way would render you subject to further inquiry if you voted not guilty?

Would the fact that the defendant is a president of a union affect your judgment in this case?

I am directing this question to those members of the panel who told us that they are members of unions: Would the fact that the defendant is president of a union other than yours affect your judgment in this case?

Are any of you ladies and gentlemen opposed to organizing Government employees by labor unions?

Are any of you temporary employees of the Government? That is, without civil service status?

(There was a showing of hands.)

Let me ask you this question of you three: Do you believe that a verdict of not guilty in this case, if con-

scientiously felt, that the defendant was not guilty, do you believe that such verdict would jeopardize your
21 job or your chances of promotion or your chances of getting a permanent status?

. . . . . .

28 (Thereupon, the following jury was duly sworn:

1. Marion E. Ruffin
2. Grace I. Butler
3. John S. Cannon
4. Barney Pellman
5. George R. Cole
6. Josephine F. Cooper
7. Ivano J. Garnett
8. Dedis M. Abbott
9. Jeannette J. Ward
10. Alice H. Herrity
11. Robert D. Langley
12. Thelma L. Marshall)

. . . . . .

Mr. Hitz: Your Honor, the defense has objected to the pertinency testimony going to the jury.

The Court: You would like to put that on now?

. . . . . .

30 Mr. Hitz: I think we could put it in now and then if decided adversely on the legal question there never would be any jury question here.

The Court: Suppose you make your opening statement, and I will let the jury go.

(In open court:)

Opening Statement on Behalf of the Government

Mr. Hitz: May it please the Court, and members of the jury, this is a very simple case so far as the fact issues are concerned. The indictment charges that Abram Flaxer was summoned to appear before the internal security subcommittee of the Senate on October 5, 1951. We will produce here the subpoena that summoned him to appear. He was served on September 19, 1951, with that subpoena. And it stated certain things which the committee desired him to bring—certain papers.

He was addressed in New York City by the subpoena and he was told to bring with him when he appeared such records of the union known as the United Professional Workers of America. If I may say here, that isn't the real name of this union, it is the United Public Workers of America. Mr. Flaxer didn't at the time of receiving this subpoena or at the time of the hearing make any point of the fact that "Professional" was used in-
31 stead of "Public" in the subpoena. That isn't any part of this case.

Which records will show the total amount of funds now in possession of the union, the sources from which union funds are obtained, the places at which union funds are on deposit, and a list of those organizations to which the union has contributed within the past twelve months. And bring with you also records of the union showing names and addresses for all members of the United Professional Workers who are employed by the Federal Government of the United States of America, and records showing names and addresses of all members who are employed by any state, county or municipal government anywhere within the United States of America.

Mr. Flaxer showed up as he was bidden to do by the subpoena on October 5 here in Washington before the subcommittee. Actually, Senator Watkins had been designated by the chairman of the subcommittee to hold these hearings on this particular day, and he was the only Senator present.

Mr. Flaxer was asked if he had the papers that he was summoned to bring, and he said he had some and didn't have others. He produced a good bit of the financial material that I mentioned in the first part of the subpoena, and he refused to bring any of the records of the membership of the union, whether in federal government or in state, county and municipal government.

He was told that he would have to produce it.
32 The reasons that he gave for not producing the

records, the committee told him, were not sufficient, and they demanded that he produce those records. His refusal was, "I don't have them with me." And when he was told that his reason for not producing these records wasn't sufficient, he was told that if he was going to accept the demand of the committee and produce those records, they'd give him additional time, although he had had since September 19 to gather them together. He was told he would have a week or ten days in which he could go get those records and bring them in. And he was asked, "Do you intend to go get them and bring them in now?" And he said, "I won't tell you, I'll have to take it under consideration." He said that a couple times and the committee dismissed him. And he never did produce these records.

Mr. Marcantonio: At that point I will object, if Your Honor pleases. May we come to the bench?

The Court: Yes.

(At the bench:)

Mr. Marcantonio: I submit that the prosecutor is limited to the indictment. The indictment states that this defendant failed to produce on October 5th. Anything that transpired beyond October 5th is not part of this case—whether he produced or failed to produce beyond October 5th is not part of this case. He is not being charged with failure to produce on any other date, he is being
33 charged with failure to produce beyond October 5th, and I submit the prosecutor should not be permitted to go into any matters beyond that date.

The Court: I understood what the prosecutor was saying to be applicable to that refusal.

Mr. Marcantonio: Only as to the 5th, that he did not produce the record on the 5th. If he limits himself to that, that is one matter; if the prosecutor intends to show that subsequent to the 5th he never produced these records, I submit it is beyond the indictment here. The indictment

is limited to the 5th. Did he or did he not produce on the 5th. The charge is that he did not produce on the 5th. That is the charge with which we are faced—nothing else.

The Court: Are these references for the purpose of explaining what was said?

Mr. Hitz: Absolutely. The demand by the committee is part of the refusal. And he was told, "If you will produce them in ten days, it is all right," and he didn't produce them. It is part of the transaction.

Mr. Marcantonio: That isn't the point. Let's stick simply to what he was told but not what he did or didn't do after the 5th. He is not charged here with doing or not doing anything after the 5th.

The Court: I will overrule the objection. I think this has all to do with the violations charged.

. . . . . .

34 Mr. Hitz: And he said he would take it under consideration, and he never did produce these records to the committee within the week, ten days, or any other time.

. . . . . .

35 Mr. Marcantonio: The defendant moves for a judgment of acquittal on the basis of Mr. Hitz's statement. If Your Honor will recall, Mr. Hitz pointed out that this defendant was served with a subpoena duces tecum directing him, commanding him to present certain records of the United Professional Workers of America, not of the United Public Workers of America, as is charged in the indictment.

Mr. Hitz has stated that the defendant was
36 president of the United Public Workers of America, and not of the United Professional Workers of America.

On the very face of the subpoena, which Mr. Hitz has recited in his opening statement, it is now obvious to Your Honor that the subpoena did not call for the production

of the records charged in the indictment, that this defendant should have brought and did not bring; it called for the production of records of another organization.

The Court: Has that been the subject of a motion heretofore?

Mr. Marcantonio: No, ma'am, because that's a matter of proof. That was not a matter that could come up on a motion to dismiss the indictment.

Mr. Rein: The indictment read, United Public Workers.

Mr. Marcantonio: The indictment which is before Your Honor and which Your Honor can consider, reads, United Public Workers.

Mr. Rein: The first time this was brought into the opening statement, it was the records of another organization.

Mr. Marcantonio: This is the first time we have reached this bridge.

The Court: I will consider your motion but won't rule on it at this time. I will overrule it for the purpose of going on with this case.

* * * * * * * * * *

39 Mr. Hitz: I have some formal documents I can offer now. I offer what has been marked Government's Exhibit 1-A, which is the resolution, number 366, of the Senate, dated December 21, 1950, which authorizes certain investigation by the judiciary committee. I offer it in evidence.

Mr. Marcantonio: No objection.

The Court: It may be received.

(Subject document was marked Government's Exhibit No. 1-A and received in evidence.)

* * * * * * * * * *

40 Mr. Hitz: The next exhibit is Government's Exhibit No. 3, which is an extract from Senate resolution 180 of February 1, 1950, which deals with the subject

of quorum, and I will read that if it is admitted in evidence.

Mr. Marcantonio: No objection, Your Honor.

Mr. Hitz: If it is received, I will read a part of it, Your Honor.

The Court: Very well, it may be received.

41 (Subject document was marked Government's Exhibit No. 3 and received in evidence.)

Mr. Hitz: I am reading a part of it:

"3 (a) Except as provided in paragraph (b) of this subsection, each standing committee and each subcommittee of any such committee is authorized to fix the number of its members but not less than one third of its entire membership who shall constitute a quorum thereof for the transaction of such business as may be considered by said committee subject to the provisions of Section 133 (d) of the Legislative Reorganization Act of 1946."

The Court: Do I understand that has a limitation on the minimum number?

Mr. Hitz: Yes, it has, to transact business. But it has another section which I haven't finished reading.

Then, part (b), and I am reading without omission:

"Each standing committee and each subcommittee of any such committee is authorized to fix a lesser number than one third of its entire membership who shall constitute a quorum thereof for the purpose of taking sworn testimony."

Those are my offers at this time. I would like now to have Mr. Arens called.

Thereupon—

Richard Arens

was called as a witness by the Government, and being first duly sworn, was examined and testified as follows:

42 Direct Examination

By Mr. Hitz:

Q. Give your full name, please, Mr. Arens. A. Richard Arens.

Q. A-r-e-n-s? A. Yes, sir.

Q. Your occupation now, sir? A. At the present time I am staff director of the subcommittee on immigration of the committee on the judiciary, of the United States Senate, and also special counsel to the subcommittee on internal security of the committee on the Judiciary of the United States Senate.

Q. How long have you been with the judiciary committee? A. Since February of 1947.

Q. Are you familiar with the provisions of Senate Resolution 366, which gave certain duties to the judiciary committee or a subcommittee to be designated? A. I am.

Mr. Hitz: May I read certain parts of that resolution, Your Honor? I think it would be well to get that in mind at this time.

Senate Resolution 366:

"Whereas, the Congress from time to time has enacted laws designated to protect the internal security of the

43 United States from acts of espionage and sabotage and from infiltration by persons who seek to overthrow the Government of the United States by force and violence, and

"Whereas, those who seek to evade such laws or to violate them with impunity constantly seek to devise and do devise clever and evasive means and tactics for such purposes, and

"Whereas, agents and dupes of the world communist conspiracy have been and are engaged in activities including the origination and dissemination of propaganda designed and intended to bring such protective laws in

disrepute or disfavor and to hamper or prevent effective administration and enforcement thereof, and

"Whereas, it is vital to the internal security of the United States that the Congress maintain a continuous surveillance over the problems presented by such activity and threatened activity and over the administration and enforcement of such laws,

"Now, therefore, be it resolved that the committee on the judiciary or any duly authorized subcommittee thereof is authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation and enforcement of the Internal Security Act of 1950; (2) the administration, operation and enforcement of other laws relating to espionage, 44 sabotage, and the protection of the internal security of the United States; and (3) the extent, nature and effects of subversive activities in the United States, its territories and possession, including but not limited to espionage, sabotage and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world communist movement or any other movement seeking to overthrow the Government of the United States by force or violence • • • •"

After that, Your Honor, are certain provisions with respect to the administration of the duties of the judiciary committee or subcommittee when it sits for this purpose.

By Mr. Hitz:

Q. Mr. Arens, pursuant to resolution 366 of the Senate, which I have just read, which is our Government 1-A, did the chairman of the judiciary committee determine whether it would carry out the investigative duties under that resolution by the judiciary committee or a subcommittee of it? A. Yes.

Q. And the chairman decided to do it in which way? A. By the appointment of a subcommittee.

Q. What name was given to that subcommittee? A. The internal security subcommittee of the United States Senate.

45 Q. Can you tell us approximately when it was appointed? A. It was in January, 1951—about the middle of January, thereabouts.

Q. Who was named to the subcommittee on internal security? A. Senator McCarran, chairman; Senator Eastland, Senator Smith of North Carolina, Senator O'Connor of Maryland, Senator Ferguson of Michigan, Senator Jenner of Indiana, and Senator Watkins of Utah.

Q. Thereafter, did the subcommittee take any action with respect to what should thereafter comprise a quorum of the subcommittee to take testimony? A. Yes, the subcommittee passed a resolution to the effect that one Senator, member of the subcommittee, would constitute a quorum for the purpose of taking testimony.

Q. When was that Mr. Arens? A. It was shortly after the organization of the subcommittee. It was in January, likewise, of 1951.

Q. Was that action stating that a single member could comprise a quorum of the subcommittee to take testimony pursuant to any rule of the Senate theretofore passed? A. Yes, the Senate itself passed a resolution to the effect that a committee could designate less than a third of the membership or less than half of the membership,

46 one or more Senators, for the purpose of taking testimony, and a similar resolution was passed by the Senate committee on the judiciary.

Mr. Hitz: That authority, Your Honor, which he has mentioned here, is contained in document that I read the two parts from, if Your Honor will recall.

The Court: Yes, I recall.

By Mr. Hitz:

Q. Now, Mr. Arens, do the rules of one session of the Senate carry over into the next Senate unless changed? A. Yes, the Senate has repeatedly decided that.

Q. When the internal security subcommittee in the month of January took the action permitted to it to decree that less than a third could be a quorum, was there actually a quorum present of the subcommittee to take that action? A. Yes.

Q. How many were present? A. There were all but, I believe, one present at the session of the subcommittee.

Mr. Marcantonio: I didn't get that last answer.

The Court: I will have it read to you, sir.

(The last answer was read.)

By Mr. Hitz:

Q. That is, which took the action to permit a
47 quorum of one to act to take testimony? A. That is correct.

Q. Were you there? A. Yes, sir, I was.

Q. I have here Government's Exhibit No. 5 for identification. Will you look at all parts of it and answer the questions only, are you able to identify it? Don't tell us what it is—just that fact. A. Yes, sir, that is a copy—

Mr. Hitz: Excuse me just a minute. We offer Government's No. 5.

(Copy of subpoena was marked Government's Exhibit No. 5 for identification.)

Mr. Marcantonio: We object and ask leave to be heard on our objection. The indictment reads as follows:

Defendant Abram Flaxer was summoned as a witness by authority of the United States Senate, the Congress of the United States, through its aforesaid subcommittee, to appear and produce before the said subcommittee on October 5th certain records upon the matter under inquiry

before the said committee, that is, to produce records, among others of the United Public Workers of America, showing (1) names and addresses for all members who are employed by the Federal Government of the United States of America, and (2) names and addresses of all members who are employed by any state, county, or municipal government located anywhere within the
48 United States of America.

So much of the indictment that is relevant to my argument.

The subpoena which Your Honor has before you calls for production of the records of the United Professional Workers of America. Therefore, that is definitely at variance with the charge contained in the indictment. It is not competent, it is not relevant, and it is not material.

The charge in the indictment states that this witness was called to produce the records of the United Public Workers of America. The subpoena recites records of the United Professional Workers of America. For that reason we object to the introduction of the subpoena.

The Court: The objection is overruled.

(Government's Exhibit No. 5, heretofore marked for identification, was received in evidence.)

Mr. Hitz: May I read a brief portion of this to the Court, Your Honor?

The Court: Yes.

Mr. Hitz: It is addressed to Mr. Abram Flaxer, 2 Lafayette Street, or another address, New York City:

"Pursuant to lawful authority, you are hereby commanded to appear before the Subcommittee on Internal Security of the Committee on the Judiciary of the Senate of the United States, on Friday, October 5, 1951, at
49 10 o'clock, a.m., at their committee room, 424 Senate Office Building, Washington, D. C., then and there to testify what you may know relative to the subject matters under consideration by said committee. You are

commanded to produce and bring with you such records of the union known as United Professional Workers of America, which records"—and I will omit from there to the end of that sentence—

Further quotation: "And bring with you also records of the union showing names and addresses for all members of the United Professional Workers who are employed by the Federal Government of the United States of America, and records showing names and addresses of all members who are employed by any state, county, or municipal government located anywhere within the United States of America."

And that part of the subpoena which states on its reverse side that Donald Connor—is it Connors or Connor?

The Witness: Donald Connors.

Mr. Hitz: Donald Connors, Jr., made service of this subpoena on September 19, 1951, upon Abram Flaxer at 5 Beekman Street in New York City at 2:30 p.m.

The Court: You offered that, and Mr. Marcantonio objected, and I don't believe I ever said it was admitted.

Mr. Hitz: I thought you did overrule the objection.

The Court: I did overrule it, but I didn't say that it was admitted. But it is.

By Mr. Hitz:

Q. Mr. Arens, did Mr. Flaxer appear before the committee in Washington on October 5, '51? A. Yes, sir.

Q. Where did he appear? A. In the Senate Office Building in a hearing room.

Q. Who of the Senate subcommittee was present? A. Senator Arthur Watkins of Utah.

Q. Was he the only Senator from the subcommittee? A. Yes, sir.

Q. Did he comprise the subcommittee that day? A. Yes, sir.

Q. Will you tell us who designated him to sit on that particular day to hear this testimony? A. The chairman of the subcommittee.

Q. Was it the practice of the subcommittee chairman to designate such persons for such purposes? A. Yes, sir.

Q. While Mr. Flaxer was under testimony did Senator Watkins remain throughout? A. Yes, sir.

Q. Mr. Arens, do you have a copy of the proceedings of that day? A. I do.

51 Q. I wonder if you would read to the Court and to the record what took place up to a certain point, at which time I will ask you to stop. Will you read the first several pages of it.

. . . . . .

53 A. (Reading) The subcommittee met at 10 a.m., pursuant to notice, Senator Arthur V. Watkins presiding.

Present: Senator Watkins.

Also present: Richard Arens, staff director; Frank W. Schroeder, professional staff member; Donald D. Connors, JA, investigator; Mitchel M. Carter, investigator; Edward R. Duffy, investigator.

Senator Watkins. The committee will resume the session.

The chairman has in his hands here the subpoena issued to Mr. Abram Flaxer. Is the witness present?

Mr. Flaxer. Yes.

Senator Watkins. Will you stand and be sworn. Do you solemnly swear that the testimony given in the matter now pending before the subcommittee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. Flaxer. I do.

Mr. Chairman. I notice that we do not have a quorum of the committee here.

Senator Watkins. We do have a quorum. Under our rules, which we are to make, one present makes a quorum.

Mr. Flaxer. I am not sure about that. I would like to have the record show that I object to the fact that I think there is no quorum.

Senator Watkins. The record will show your
54 statement. Proceed, please.

Mr. Arens. Will you kindly identify yourself by name and position?

Mr. Flaxer. My name is Abram Flaxer. I am the national president of the United Public Workers of America.

Mr. Arens. Mr. Flaxer, are you represented today by counsel?

Mr. Flaxer. Yes.

Mr. Arens. May I suggest to the chairman that the counsel kindly identify himself?

Mr. Rein. My name is David Rein. My address is 711 Fourteenth Street, Washington, D. C.

Mr. Arens. How long have you been president of the United Public Workers of America?

Mr. Flaxer. Since 1946.

Mr. Arens. And where is your office located?

Mr. Flaxer. In New York City.

Mr. Arens. You are appearing here today in response to a subpoena which was served upon you?

Mr. Flaxer. Yes.

Mr. Arens. The subpoena is a subpoena duces tecum, and commands the production of certain records; is that correct?

Mr. Flaxer. Yes.

55 Mr. Arens. And do you have those records with you today?

Mr. Flaxer. I have some. I produced all the items called for in the subpena except one item.

Mr. Arens. May I respectfully suggest to the chairman that the witness proceed at his own pace to identify the documents which he has produced in response to the subpena, and then we will consider whether or not those documents do comply with the subpena; and I would respectfully suggest to the chairman that, after he has identified each of the several documents which he presently has before him, they be received for the record?

Senator Watkins. That will be the procedure.

Mr. Flaxer. I am glad to do that. You requested, and I have, the banks in which we have our funds as well as the total amount of our assets, I believe.

I have here a letter from the Immigrant Savings Industrial Bank, where we have a savings account.

I have here a letter from the Corn Exchange Bank, where we have a current account.

I have here a letter from the East River Savings Bank, which is a savings account.

I further have a bank statement from the Bankers Trust Co., identifying a death-benefit fund that we have.

That is all of the money that we have. You wished
56 to know the sources—

Mr. Arens. If you will excuse me just a moment, are these the only documents which you brought with you bearing on the financial situation?

Mr. Flaxer. Yes.

Mr. Arens. May I respectfully suggest that the documents which have just been identified by Mr. Flaxer be marked "Flaxer Exhibits 1, 2, 3, and 4," respectively, and received for the record?

Senator Watkins. It is so ordered.

(Flaxer exhibits 1, 2, 3, and 4 were marked and received for the record.)

Mr. Flaxer. You then asked for a statement which would identify the sources of our income. I have here a statement that we give annually to the United States Treasury Department which will give in great detail the sources of our income.

Senator Watkins. It may be marked in the next consecutive order as the exhibit.

(Flaxer Exhibit 5 was marked and received for the record.)

Senator Watkins. Who prepared this statement?

Mr. Flaxer. That is prepared by our accountants. Then you asked for a list of the contributions that we have given

to various organizations during the past 12 months.
57 I have here a list of contributions that we have given since May 1, 1950, through August 31, 1951, which is the latest record that we have.

Mr. Arens. This was prepared under your supervision and direction?

Mr. Flaxer. Yes.

Senator Watkins. That will be received in evidence and marked the next consecutive number.

(Flaxer exhibit No. 6 was marked and received for the record.)

Mr. Flaxer. I think that sums up the records which are required with respect to the financial status of our organization. The item which I have not produced is the item on membership lists of our union. The demand for the production of this item raises a number of profoundly serious issues. From the very beginning of the union movement in this country, the rights of unions to the privacy of their membership records—

Mr. Arens. You are reading from a prepared statement?

Mr. Flaxer. Yes.

Mr. Arens. Who prepared the statement?

Mr. Flaxer. I did. (Continues:) Has been one of the basic precepts to which the labor movement of America has adhered. Bitter experience has taught American
58 labor that the right to join a union is an empty right unless the fact of membership can be kept private. Throughout our history, employers and antilabor groups have attempted to violate the secrecy of union records in order to compile blacklists for the sole purpose of destroying unions. This has been amply documented in the hearings of the LaFollette committee. After bitter struggles in and out of the Halls of Congress, labor has succeeded in enacting into law this right of privacy. Countless decisions of the National Labor Relations Board and of our Federal courts have upheld that right. Indeed, the mere query by

an employer of an employee as to his union membership has been held to be an unfair labor practice even under the Taft-Hartley Act.

Every individual who joins a union joins it with the confidence and trust supported by tradition and law that the act of joining and maintaining membership is a personal right and freedom that is inviolate. A request such as the present constitutes a wholesale invasion of such privacy and "the right to be let alone" which is protected by the fourth amendment. Every trade-union member imposes a special trust in his union officers to protect and preserve that right. Therefore, to submit to the request in this subpena would be a violation of the trust imposed
59 in me by my membership and a betrayal of the entire tradition of the trade-union movement in this country. I have no doubt that not a single union president would find it possible to comply with such a request.

I am confident that the members of this committee, after considering my views and after a study of the full implications of the request made in this subpena, will realize its conflict with the basic union tradition of this country now incorporated into Federal law and withdraw the demand for membership lists.

Mr. Arens. Do you have such a list?

Mr. Flaxer. I have no such list with me.

Mr. Arens. Do the records of the United Professional Workers reflect such a list? Is the information available, in other words?

Mr. Flaxer. I want to make a minor correction there. Our union is the Unifed Public Workers.

Mr. Arens. I meant the United Public Workers.

Mr. Flaxer. Your subpena stated "Professional Workers." I recognized it was an error in your identification.

Mr. Arens. Did the United Public Workers' organization have the information available which is called for in the subpena?

Mr. Flaxer. Well, we generally have such information.

Mr. Arens. How many members are there of the
60 United Public Workers?

Mr. Flaxer. I can give you a round figure on the basis of my estimate. We have about 35,000 members.

Mr. Arens. How many members does the United Public Workers have who are employed in the Federal Government?

Mr. Flaxer. It is hard for me to tell you exactly. I would estimate that perhaps about 5 percent of the total would be Federal employees.

Mr. Arens. In what agencies of the Federal Government are there employees who are members of the United Public Workers?

Mr. Flaxer. Again I am not giving you the exact information, because I don't know the exact information; but, generally, our membership is basically in the Bureau of Engraving, in the Treasury Department, Post Office, Veterans' Administration. I think that would be the main bulk.

Mr. Arens. The subpena calls for a breakdown of your membership in the Federal Government by agencies in which the membership is employed; is that not correct?

Mr. Flaxer. I don't know. I don't remember that.

Mr. Arens. The subpena calls for records of the union showing the names and addresses of all members of
61 the United Public Workers who are employed by the Federal Government of the United States of America, and records showing names and addresses of all members who are employed by any state, county, or municipal government located anywhere in the United States of America.

Mr. Flaxer. That does not ask for a breakdown, department by department. It asks for a membership of Federal employees.

Mr. Arens. I understand. You say approximately 5 per cent of your 35,000 members are employed in the Federal Government?

Mr. Flaxer. That is true.

Mr. Arens. Where are the other 95 per cent employed?

Mr. Flaxer. In the state, county, and municipal governments, basically.

Mr. Arens. Kindly identify in general the agencies of the States and the areas in the States in which the 95 percent of the membership of the United Public Workers is employed.

Mr. Flaxer. That is a pretty tall order. I can give you again a general idea as I understand it. Mainly, we are organized among the municipal employees and the county employees. We don't have too many state employees, although I would say, too, there may be 10 percent,
62 perhaps, maybe 5, because in some States there is a sort of overlapping between county and State employment. But, as I say, mostly it is municipal employees.

Mr. Arens. In what States do you have a concentration membership?

Mr. Flaxer. They are pretty evenly divided in a lot of states.

Mr. Arens. In what State do you have the largest number of your employees compared to the other States?

Mr. Flaxer. I would say New York.

Mr. Arens. How many local units are there of the United Public Workers?

Mr. Flaxer. About 100.

Mr. Arens. And where are they concentrated?

Mr. Flaxer. All around the country.

Mr. Arens. Your greatest concentration, however, is in New York; is it not?

Mr. Flaxer. Yes.

Senator Watkins. May I ask this question: Do you have the bargaining rights for any particular institution or employees in any particular institution?

Mr. Flaxer. There are no such things as bargaining rights in that sense of the word, sir, in the Government service. You take up the grievances with the administration. You appear at hearings—that is, wage hear-

63 ings—before a budget commission, or appear before the legislative halls to enact some legislation. You might appear at hearings before the enactment of legislation on pay increases, and so on. But we don't have bargaining in the sense that you do in private industry. There are no contracts, no elections, none of that.

Senator Watkins. You are not required, therefore, to sign any non-Communist affidavits?

Mr. Flaxer. No.

Senator Watkins. In order to represent these employees.

Mr. Flaxer. That is right.

Senator Watkins. That is, in the various other capacities you have been talking about.

Mr. Flaxer. That is correct.

Mr. Arens. Do you have membership in almost all of the Government agencies? By "Government," I mean the Federal Government agencies.

Mr. Flaxer. No; I said "No."

Mr. Arens. You told us where you had a concentration of your membership in the Federal Government. What Government agencies do you not have?

Mr. Flaxer. I don't know. I think, if you would ask me more specifically what agencies you have in mind—

Mr. Arens. You said the Post Office. How many do you have in the Post Office.

64 Mr. Flaxer. Not a hell of a lot, but we have a few locals.

Mr. Arens. How many locals?

Mr. Flaxer. We have three local unions.

Mr. Arens. Where are they located?

Mr. Flaxer. They would be in New York and Chicago and Los Angeles.

Mr. Arens. What is your total membership in the Post Office?

Mr. Flaxer. Oh, I don't know. I guess maybe about a thousand or so.

Mr. Arens. Tell us similar information on the Veterans' Administration, if you please.

Mr. Flaxer. I think that is mainly in the city of New York. The number of members we have there I couldn't tell you, because I don't know.

Mr. Arens. Would you have more than a thousand?

Mr. Flaxer. No.

Mr. Arens. Less than a thousand?

Mr. Flaxer. Yes.

Mr. Arens. More than 500?

Mr. Flaxer. That I don't know.

Mr. Arens. How many Veterans' Administration locals do you have?

Mr. Flaxer. There is one local of Federal employ-
65 ees in New York which encompasses all of the veterans employees, including the post office employees.

Mr. Arens. How many do you have in the State Department?

Mr. Flaxer. None as far as I know of.

Mr. Arens. How many do you have in the Treasury Department?

Mr. Flaxer. The Bureau of Engraving is the main concentration there.

Mr. Arens. Approximately how many do you have there?

Mr. Flaxer. I imagine about 500; maybe less.

Mr. Arens. What other Government agencies, and by Government, I mean the United States Government, do you have membership in, irrespective of the volume of the membership?

Mr. Flaxer. Again I say I really couldn't tell you. I am on the record here, and I would not want to give you a statement that may not be entirely correct.

Senator Watkins. You can give your best judgment.

Mr. Flaxer. I don't know.

Senator Watkins. You don't have any judgment on that?

Mr. Flaxer. Well, I don't have the facts on the basis of which I can make a judgment because—I guess that is the answer.

66 Mr. Arens. Mr. Chairman, I respectfully ask of the chairman that the witness be ordered to produce

for this record, in compliance with the subpena duces tecum served upon him, the record of the United Public Workers showing the names and addresses of all members of the United Public Workers who are employed by the Federal Government of the United States of America, and records showing the names and addresses of all members who are employed by any State, county, or municipal government located anywhere in the United States of America.

Senator Watkins. Do you understand the request made of you?

Mr. Flaxer. Yes; I do.

Senator Watkins. Do you stand on your statement that you refuse to produce those?

Mr. Flaxer. I didn't say I refused. I indicated the situation is such that I find myself incapable of producing them. I think if I complied with a request of that kind, first of all I don't think I have the right either in terms of our membership or in terms of the labor movement generally—

Mr. Arens. But you do have the information?

Mr. Flaxer. In a general sense, I think I have the information.

Mr. Arens. And you have not complied with the command of the subpena to produce that information.

67 Mr. Flaxer. I think it is an improper command, sir.

Senator Watkins. That is the reason you have refused to bring them here today, because you think it is improper?

Mr. Flaxer. That is the reason I haven't got them.

Senator Watkins. That is the main reason. You are directed by the committee to produce those records according to the terms of the subpena.

Mr. Flaxer. Again I plead with the chairman and with the committee to reconsider the entire matter, because I think you are infringing on a right that workers in America have, including Federal employees. You are the Government. You are the employer. You are as an employer

asking for membership lists. You want your own employees to identify themselves as to their trade-union membership. This is something that has not been done in America for the past 10 or 15 years, and where it has been done, it has been condemned as an unfair labor practice. And I just don't believe, sir—

Senator Watkins. As I understand it, you do not claim any rights under the Taft-Hartley Act, because you have not complied with it, and the Government itself, I think, would be entitled to know of its employees whether or not they are members of a union.

Mr. Flaxer. Then I think they ought to ask the employees. I don't think they are entitled to know sir. I don't think so. I think the Government as an employer ought to adhere to the general national policy on this question. The general national policy on this question is that an employer has no right to ask a union member whether he belongs to an organization even if he tells that union membership that he doesn't even have to tell him. There are cases on record, upheld by the Federal courts of the United States, where the employer is enjoined from asking a person whether he belongs to a union, even though there is no punishment attached to it.

Senator Watkins. I would not argue with you for employees outside of the Government service, or State, county and municipal service. I am not going to argue that question because it is not at issue here. But we have here now an organization made up of people who are working for Government and we are asking you specifically for the names of those who are working for Government. You have that within your information and I do not think there is any law or any court holding that the United States itself cannot find out the names of a union and the people who belong to it that are in its employ.

Mr. Flaxer. Sir, I don't think the issue has ever come up before.

Senator Watkins. Maybe it has not, but I do not think any court would ever resolve itself against the

68-a United States finding out what organization its members belong to.

Mr. Arens. How long would it take you, Mr. Flaxer, to prepare the information which is called for in this subpena?

Mr. Flaxer. I don't know.

Mr. Arens. Could it be done in a week?

Mr. Flaxer. I imagine it could be done in a week.

Mr. Arens. I respectfully suggest to the chairman that the witness be ordered to produce the information and transmit it to the subcommittee in 10 days' time.

Senator Watkins. Since you have made the reply that it could be done in a week, that will be the order of the committee, that you submit that information as requested by counsel for the committee within 10 days from this date. The record will show that you of course have been given that notice and that requirement has been made, and the order has been made.

Mr. Flaxer. I would like to suggest to the committee to reconsider that. I think you ought to consider it in light of the facts that organized labor in America will recognize in this a break in the wall that they have built up over half a century against the initiation of blacklists. I don't think that these lists can be looked upon in any other light than as blacklists.

68-b Mr. Adams—(interpolating) That is an error in the printing; it should be Mr. Arens.

(reading) Who is the vice president of the United Public Workers of America?

Mr. Flaxer. We don't have a vice president.

Mr. Arens. Who are the national officers of the United Public Workers of America?

Mr. Flaxer. I am, and Mr. Ewart Gunner.

Senator Watkins. May I direct your attention to the fact that this is an executive session and the records are not public here unless the order of the committee is to make them public. But at least for the present the records are to be delivered to the committee in executive session.

Mr. Flaxer. Sir, on that I don't see any good purpose that these records would serve, even if I were to produce them. I think they are wholly irrelevant, if you say they are not to be made public.

Senator Watkins. I am not promising you they would not be made public, because I do not think the Government has to make such a promise to get the information.

Mr. Flaxer. I think, with all due respect to the committee, you are infringing here on an area which just crosses the boundaries of individual rights as well as trade-
68-c union rights far beyond the contemplation of any—

Senator Watkins. Whatever your argument is, that is the order now, and, as I understand it, you refuse to do so on the ground you set forth. I want to make the record clear.

Mr. Flaxer. I haven't got them. I don't feel capable of producing them.

Senator Watkins. You said you could do it within a week.

Mr. Flaxer. No; that was not the question he asked. He asked could the list be compiled within a week and I said it could.

Mr. Arens. The information is available to you?

Mr. Flaxer. Yes.

Mr. Arens. But you have declined to produce it; is that correct?

Mr. Flaxer. I haven't produced them.

Mr. Arens. Will you produce it pursuant to the order of the chairman of this session within 10 days from today?

Mr. Flaxer. I will have to take that under consideration.

Senator Watkins. That is the order, and of course we will have to take whatever steps are necessary if at the end of the time you have not produced them.

(End of reading.)

69 By Mr. Hitz:

Q. I think that is all we need to read now, Mr. Arens. Will you tell the Court why you subpoenaed, why the com-

mittee subpoenaed Mr. Flaxer and his union records? A. I think it would necessitate reference first of all, if you please, to the resolution under which the committee was operating; that is, to maintain a kind of surveillance over the administration and operation of the internal security laws of the country, and to—

Mr. Marcantonio: At this point I think the witness has gone far enough to indicate that the witness has given us argument, rather than what he knows of his own knowledge—if he attended a committee meeting, what was said at that committee meeting as to the investigation of this union. The witness is now giving us his opinion.

The Court: Read the question, please.

(The last question was read.)

The Court: We have a copy of the resolution here.

Mr. Hitz: I think I can shorten it up.

By Mr. Hitz:

Q. Did you have any witnesses before the subcommittee that testified concerning Mr. Flaxer? A. Yes, sir.

Q. Did they say whether or not in their opinion he was a member of the Communist party? A. Yes, sir.

70 Mr. Marcantonio: I object.

The Court: The objection is overruled.

By Mr. Hitz:

Q. What did they say? A. He had been identified before the committee and in statements made to investigators of the committee by persons who had been associated with him, and by him I mean Mr. Flaxer, in the communist party.

Mr. Marcantonio: I move to strike out the answer, and renew my objection to the question on the further ground that whatever statements were made to which this witness has testified with regard to the defendant Flaxer were not made in the presence of the defendant, therefore not binding on this defendant in this trial.

Mr. Hitz: We are not trying to prove he was a communist, we are trying to prove that the committee thought he was, and that is enough to get him before the committee, and his records.

Mr. Marcantonio: Even at that, any statements, accusations made about this defendant, not made in his presence, any conversation not made in his presence is not binding on this defendant, and therefore inadmissible.

The Court: Were you present when any of these statements were made that you refer to?

71 The Witness: Yes, ma'am. By statements I am referring in part to the testimony which had been previously given in the subcommittee by witnesses.

The Court: The objection is overruled.

By Mr. Hitz:

Q. You say that they testified that he was a member of the communist party, is that right? A. Yes, sir.

Mr. Marcantonio: May I have a continuing objection to this line of questions?

The Court: Yes.

By Mr. Hitz:

Q. Did the extent of his participation in the communist movement get testified to before the committee? A. Yes, sir.

Q. And his participation was what? A. Well, he was identified by a witness as a person who had been a tried fanatic of the communist party. I believe that is almost an exact quotation, if not an exact quotation.

Q. Did you have any testimony before the committee prior to October 5 with reference to the United Public Workers of America? A. Yes, sir.

Q. Was there any testimony concerning Mr. Flax-
72 er's connection with that union? A. Yes, sir.

Q. And the activities of the union? A. Yes, sir.

Q. And what were the activities of the union, according to the information in the hands of the committee? A. The

testimony in the hands of the committee was to the effect that the United Public Workers was an organization with some 35,000 to 50,000—the estimates varied—who were employed in various governmental agencies—federal, state, county, municipalities; that the president of the organization, Mr. Flaxer, was a hard core member of the communist party, and that the secretary-treasurer was likewise a member of the communist party.

Q. Can you name him, Mr. Arens? A. Mr. Ewart Guiner, E-w-a-r-t G-u-i-n-e-r. That the negotiations director, a man who had in the recent past been negotiations director of the United Public Workers, was a member of the communist party, and that certain of the members of the executive board or board of directors, the control board of the entity known as the United Public Workers, were members of the communist party.

Q. Were those matters within the information of the committee before Mr. Flaxer was subpoenaed? A. Yes, sir.

Mr. Hitz: I think that is all of the direct.

73 The Court: Do you have any cross examination?

Mr. Marcantonio: Not too much—rather limited. May I proceed?

The Court: Yes.

Cross Examination

By Mr. Marcantonio:

Q. I show you Government's Exhibit 5, and ask you whether or not that is an exact copy of the subpoena that was served on the defendant Flaxer? A. To the best of my recollection, it is.

Q. Who signed that subpoena? A. Well, this copy bears the signature of Pat McCarran, chairman of the subcommittee on internal security of the committee on the judiciary.

Q. That subpoena was issued by him, is that right? A. Yes, sir.

Q. Do you know who prepared the subpoena? A. The subpoena was prepared by two gentlemen in our office working together—Mr. Frank Schroeder and Mr. Don Connors. The actual typing of it was undoubtedly done by one of the young ladies, the stenographers in the office.

Q. After being prepared it was sent over to Senator Pat McCarran for his signature, is that correct? A. I assume so. I do not know, because I didn't actually accom-
74 pany the piece of paper or the pieces of paper to the Senator's office.

Q. But you say you assume so? A. Yes, sir, I assume so, because that is the practice.

Q. With regard to the information that you say was given to this committee by other witnesses respecting the alleged communist membership of the defendant, you say that information was imparted to the committee? Do you understand my question? A. I thought you had some more to your question.

Q. No. A. Yes, the subcommittee had the information which we alluded to or discussed in the previous questioning here of myself some few moments ago.

Q. You say that the subcommittee had a meeting, and the subcommittee had read to it the testimony of these witnesses to whom you referred? A. No, I did not say that, and that is not the fact.

Q. That is not the fact? A. No, sir.

Q. The subcommittee met with regard to this testimony that you have just narrated here? A. Do you mean prior to—

Q. —the calling of Mr. Flaxer.

75 The Court: Referring to the defendant, you have testified that testimony had been given about the defendant, or information that they had information?

The Witness: Yes.

The Court: That's what he is inquiring about.

The Witness: That is correct.

By Mr. Marcantonio:

Q. You say they did hold a meeting? A. Oh, yes.

Q. And it was at this meeting that the testimony of these other witnesses was discussed? That is your testimony now? A. Yes. I don't want to leave the impression that the testimony of the witnesses with reference to Mr. Flaxer was read as I here today read this testimony this session. The subcommittee is in constant communication, the members of the subcommittee, one with another. One man will take testimony, and they will discuss it with others, and the staff gets its direction from the chairman.

Q. I am now asking you specifically about this case. Do you now state that the testimony that was given to some member of the subcommittee by these other witnesses, that that testimony was discussed at a meeting of the subcommittee? A. Yes—in general, yes, sir. But I don't want to leave the impression that the testimony was laid be-
76 fore them, or read to them.

Q. When did that meeting take place? A. I could not tell you, sir.

Q. Were you present at such a meeting? A. Oh, yes, sir.

Q. Who was present at such a meeting? A. I could not recall specifically who was present. I do recall that Senator McCarran was present. As I say, the subcommittee does—the members of the subcommittee do discuss with one another, in—

Mr. Marcantonio: I move to strike out that portion of this witness' answer which starts, "They say that, subcommittees meet, and so on.

The Court: Will you read it?

(The last answer was read.)

The Court: The motion is denied. He said, "As I say." He didn't say, "As they say."

By Mr. Marcantonio:

Q. Do you know, as a matter of fact, that the committee members discussed the testimony of these other witnesses with regard to Flaxer? A. Not in any formal session, I do not know that, no, sir; from the standpoint of sitting down and reading testimony and discussing it as I have read the testimony today. I do know, because I
77 have been present in the sessions in which the testimony in general was discussed with reference to the United Public Workers and of Mr. Flaxer, that the Senators on the subcommittee did discuss it and were apprized by the staff and by the various Senators who had been taking testimony what in general was going on. That is the way the subcommittee proceeds.

Q. Mr. Arens, let's see if I can make myself clear. You referred here to the testimony of other witnesses with respect to Mr. Flaxer who had testified prior to Mr. Flaxer's testifying, isn't that correct? A. Yes, I did.

Q. Do you know of any meeting that the subcommittee held at which this testimony of these other witnesses was discussed, at a formal meeting of the subcommittee? Do you know of your own knowledge? A. It is difficult for me to answer the question categorically. I don't have an independent recollection of a session called for the purpose of discussing testimony with reference to Mr. Flaxer, in which there was perhaps more than a few, more than one or two Senators present. I do have a distinct recollection of several occasions—I would say more than one occasion—in which prior to the time that Mr. Flaxer was called Senator McCarran and one or two of the other Senators did discuss this particular proceeding and the
78 testimony which had been accumulated with reference to Mr. Flaxer, and also information which had been developed from other sources.

Q. But not at a formal meeting of the subcommittee. You have no independent recollection of that, have you? A. I

don't want to be at all argumentative here. The subcommittee did not have on matters of this character what you would say formal meeting, in the sense that there would be sent around and advance notice.

Q. Mr. Arens, that is what I am trying to find out. Was there a formal meeting of the subcommittee at which the testimony of these other witnesses who had testified about Mr. Flaxer was discussed? A. If you will let me answer it this way: The testimony was discussed at sessions at which members of the subcommittee were in attendance. Whether or not they were formal meetings or how they were called, whether or not it was on an agenda, I could not say. I could not say because I do not recall.

The Court: Were they executive meetings or public meetings?

The Witness: Undoubtedly, they were executive meetings, but the way the subcommittee operates on its meetings, frequently, is that the Senators will call one another on the phone and will say, "Can you come down to
79 my office now and we will chat about this thing." And three or four of them will meet and have lunch, and the staff will be there. They were not formal sessions in the sense that a judiciary committee meeting would be called in accordance with the rules of the Senate where a formal notice was sent out.

By Mr. Marcantonio:

Q. Aside from the formal notice, was there a meeting of this subcommittee to discuss this testimony at any given time? A. Yes, I would say that, phrasing your question as you have done so, there were—there was a meeting, and perhaps more than one meeting.

Q. Where? A. I couldn't tell you the exact place.

Q. When? A. Prior to the time that Mr. Flaxer was subpoenaed.

Q. When? Is that the best you can give us as to time? A. Well, Mr. Flaxer was subpoenaed and appeared, according to the—

Q. October 5th. A. October 5th. I couldn't tell you. That's been October 5th, 1951. I couldn't tell you the exact date, to save my soul.

Q. Nor the place? A. No, it could have been in
80 Senator McCarran's office, it could have been at lunch, it could have been in the office of Senator Watkins, it could have been in the office of—in the room of the judiciary committee—it could have been in the staff room—I mean, the Senators working on these investigations make it a point, as those of us who work with them know, to get together every two or three days in someone's office or to have lunch together, as I say, to talk over the continuing affairs of the subcommittee. And the staff is—at least the members of the staff who have key roles—are expected to be present with the Senators at that time.

Q. So what you are telling us, Mr. Arens, is what happens to be the practice, is that right? A. That is the practice, and that is what happened in this particular instance.

Q. That is the practice? A. And that is what happened in this particular instance.

Q. You have no independent recollection of any particular meeting? A. I have an independent recollection of discussions with the Senators prior to the time that Mr. Flaxer was subpoenaed of the information to which I have alluded previously here in my testimony.

Q. But not at a formal meeting of the subcommit-
81 tee? A. I think I would have to concede not at a formal meeting, sir.

* * * * * * * * * *

82 Redirect Examination

By Mr. Hitz:

Q. You were asked to attempt to locate by time and place a meeting when this matter was discussed by members of the subcommittee. I'd like to ask you if, whenever that did take place, it was information that was part of the

committee's information that was exchanged? Was it committee information that was discussed at such a gathering, Mr. Arens, or was it information from some other source? A. I don't quite understand.

The Court: Let's have the question read, or would you like to state it again.

By Mr. Hitz:

Q. Did the committee through its investigators receive certain information concerning Mr. Flaxer?

Mr. Marcantonio: I object.

The Court: The objection is overruled.

The Witness: Yes.

By Mr. Hitz:

Q. Did they? A. Yes.

83 Q. And concerning his union? A. Yes.

Q. And in testimony was informatios obtained by the committee concerning Mr. Flaxer? A. Yes, sir.

Q. And his union? A. Yes, sir.

Q. And his communist party affiliations? A. Yes, sir.

Q. Is that the information that was exchanged between members of the committee at formal or informal meetings whenever they took place prior to October 5?

Mr. Marcantonio: I object, if Your Honor pleases—the question includes here a statement to the effect that this was information given to these Senators at informal or formal meetings. This witness has testified he has no independent recollection of any formal meeting having taken place where this information was exchanged. The question now presumes something which the witness has denied, or, rather, has stated he has no independent recollection of any formal meetings having taken place.

The Court: Read the question.

(The pending question was read.)

Mr. Marcantonio: In saying formal, he is asking the question, that which is supposed to have taken place in

formal meetings, and the witness has testified he has
84 no independent recollection.

The Court: The objection is overruled. You may answer.

The Witness: Yes, sir.

Mr. Hitz: Thank you, that is all.

Recross Examination

By Mr. Marcantonio:

Q. But you had no independent recollection of this information being exchanged at any formal meeting? A. It may have been or may not have been, I don't know. I would like to explain what the difference is between a formal meeting and an informal meeting, for the record.

Q. We have gone through that. The point is, you don't know. A. No, I have no independent recollection at any formal meeting in which a notice was sent out and at which the Senators convened in a formal meeting in a hearing room, in which somebody got up and said, "Now, Mr. Chairman, I move that we discuss the Flaxer case." I have no recollection of that. Whether or not it transpired I could not say. But I do have decided recollections of conversations in which there would be two, three, perhaps four members of the internal security subcommittee in somebody's office or having lunch together, something of that character, in which decisions would be arrived at.

85 Q. Decisions? A. Yes, sir.

Q. But not a decision with regard to this defendant, do you know of any? A. Oh, I recall very distinctly sessions, not only in this particular case but in others, in which the internal security subcommittee members would meet and discuss matters, and say, "Now, whom shall we subpoena next?" And they'd say, "We think you better do this, you better do that." That is the way they proceed. That is the way investigating committees ordinarily proceed.

Q. But not in a formal session? A. That's correct.

. . . . . .

89 (The jury being absent from the Courtroom:)

Mr. Hitz: Your Honor, we have offered all we propose to offer on the mater of pertinency of the records sought. We are therefore willing to submit that question to the Court.

. . . . . .

90 Mr. Marcantonio: I would like first to address myself to the question of pertinency.

The Court: Very well.

. . . . . .

101 The Court: The resolution 366 states that the committee on the judiciary or any duly authorized subcommittee is authorized and directed to make a complete and continuing study and investigation of certain subjects, and among those the extent and nature and effects of subversive activities in the United States, including but not limited to infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world communist movement, or any other movement seeking to overthrow the Government of the United States by force or violence.

In the Dowd case, which was before the Supreme Court of the United States, and reported in 339 U. S. 382, Mr. Chief Justice Vinson, I think it was, said that Congress could rationally find that the communist party is not like other political parties in its utilization of positions of union leadership, and that many persons who believe in the overthrow of the government by force and violence are likely to resort to such tactics when they as officers have control of the labor union.

And it is a matter of common knowledge, I think, that the communists do utilize positions of power in labor

102 organizations to create chaos and to promote strikes

and other matters for purposes that are not necessarily those of union interests but rather for the promotion of the objects of the communist party.

And it is the view of the Court that the information sought is pertinent to the subject under inquiry by the committee.

Now I think we might bring the jury back.

(Thereupon, at 10:30 o'clock, a.m., the jury resumed the jury box.

* * * * * * * * * *

Richard Arens

was called as a witness by the Government, and being first duly sworn, was examined and testified as follows:

The Court: Mr. Marcantonio, do you reserve your opening statement?

Mr. Marcantonio: I have reserved it.

Direct Examination

By Mr. Hitz:

Q. Will you give your full name, Mr. Arens? A. Richard Arens.

Q. Your occupation, sir? A. At the present time I am staff director of the subcommittee on immigration
103 and naturalization of the committee on the judiciary of the United States Senate, and also a special counsel to the subcommittee on internal security of the committee on the judiciary of the United States Senate.

Q. Were you connected with the internal security subcommittee of the Senate in October, 1951? A. Yes, sir. At that time I was staff director of it, or co-director of the internal security subcommittee.

Mr. Hitz: Your Honor, I would like to read certain pertinent parts of Government's number 5, which is the subpoena to Mr. Flaxer, to the jury. Your Honor will recall it has been admitted in evidence for the hearing we have already had.

The Court: Very well.

Mr. Hitz: This is Government's Exhibit No. 5, already in evidence:

"United States of America, Congress of the United States

"To Mr. Abram Flaxer, 2 Lafayette Street or 118 Waverly Place, New York, N. Y., Greeting:

"Pursuant to lawful authority, you are hereby commanded to appear before the Subcommittee on Internal Security of the Committee on the Judiciary of the Senate of the United States, on Friday, October 5, 1951, at 10 a.m., at their committee room 424, Senate Office
104 Building, Washington, D. C., then and there to testify what you may know relative to the subject matters under consideration by said committee.

"You are commanded to produce and bring with you such records of the union known as United Professional Workers of America, which records will show the total amount of funds now in possession of the union; the sources from which union funds are obtained; the places at which union funds are on deposit, and a list of those organizations to which the union has contributed within the past 12 months. And bring with you also records of the union showing names and addresses for all members of the United Professional Workers who are employed by the Federal Government of the United States of America, and records showing names and addresses of all members who are employed by any state, county, or municipal government located anywhere within the United States of America.

"Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

"To Frank W. Schroeder and/or Donald D. Connors, Jr., to serve and return.

"Given under my hand, by order of the committee, this 13th day of September, in the year of our Lord
105 one thousand nine hundred and fifty-one.

"Pat McCarran, Chairman, Subcommittee on Internal Security of the Committee on the Judiciary."

On the back of it, "September 19, 1951.

"I made service of the within subpoena by Donald D. Connors, Jr., the within named Abram Flaxer, at 5 Beekman St., New York City, at 2:35 o'clock, p.m., on the 19th day of September 1951."

By Mr. Hitz:

Q. Mr. Arens, on October 5, 1951, was the committee on the judiciary of the United States Senate holding hearings through its subcommittee on internal security, in the District of Columbia? A. Yes, sir.

Q. Did Mr. Flaxer, the defendant here, appear at that hearing in Washington on October 5? A. He did.

Q. Are you able to identify him in the room, Mr. Arens? A. Yes, sir.

Q. If he doesn't stand up, will you come down and point him out, please. A. He is the gentleman who is now standing at the counsel table.

Q. Where was that hearing held that he attended?
106 A. In the Senate Office Building.

Q. Who was the presiding officer for the internal security subcommittee that day? A. The senior senator from Utah, Arthur Watkins.

Q. Did Senator Watkins remain throughout the time that Mr. Flaxer was before that subcommittee that day? A. He did.

Q. Did Mr. Flaxer produce some of the records and material that was described in the subpoena that I just read, Mr. Arens?

* * * * * * * * * * *

107 Q. Did he produce some of the material, Mr. Arens? A. He did.

Q. Did he produce the material having to do with the total amount of funds in the possession of the union? A. Yes.

Q. And the sources from which obtained? A. Yes.

Q. And the places where the union had its funds on deposit—the banks, and so on? A. Yes.

Q. Did he produce the records of the organization showing to what other organizations the union had contributed within twelve months? A. I believe he did. I could find out quickly by reference to the record, but I believe he did.

. . . . . .

108 By Mr. Hitz:

Q. Yes. Will you read from the statement that the subcommittee met at 10 a.m. pursuant to notice, and so forth, and read on until we ask you to stop. And so the jury will know what this is, is this a record of the hearing that Mr. Flaxer attended in answer to this subpoena? A. Yes.

Q. And is it accurate, your recollection of what took place? A. Yes.

Q. You were there throughout, were you not? A. Yes.

Q. And you are the Mr. Arens who is noted as asking most of the questions here, are you not? A. Yes.

109 Q. All right, sir, will you read it? A. (Reading)

The subcommittee met at 10 a.m., pursuant to notice, Senator Arthur V. Watkins presiding.

. . . . . .

121 Mr. Arens. Would you have more than a thousand?

Mr. Flaxer. No.

Mr. Arens. Less than a thousand?

Mr. Flaxer. Yes.

Mr. Arens. More than 500?

Mr. Flaxer. That I don't know.

Mr. Arens. How many Veterans' Administration locals do you have?

Mr. Flaxer. There is one local of Federal employees in New York which encompasses all of the veterans employees, including the post office employees.

Mr. Arens. How many do you have in the State Department?

Mr. Flaxer. None as far as I know of.

Mr. Arens. How many do you have in the Treasury Department?

Mr. Flaxer. The Bureau of Engraving is the main concentration there.

Mr. Arens. Approximately how many do you have there?

Mr. Flaxer. I imagine about 500; maybe less.

Mr. Arens. What other Government agencies, and by Government, I mean the United States Government, do you have membership in, irrespective of the volume of the membership?

122 Mr. Flaxer. Again I say I really couldn't tell you. I am on the record here, and I would not want to give you a statement that may not be entirely correct.

Senator Watkins. You can give your best judgment.

Mr. Flaxer. I don't know.

Senator Watkins. You don't have any judgment on that?

Mr. Flaxer. Well, I don't have the facts on the basis of which I can make a judgment because—I guess that is the answer.

Mr. Arens. Mr. Chairman, I respectfully ask of the chairman that the witness be ordered to produce for this record, in compliance with the subpena duces tecum served upon him, the record of the United Public Workers who are employed by the Federal Government of the United States of America, and records showing the names and addresses of all members who are employed by any State, county, or municipal government located anywhere in the United States of America.

Senator Watkins. Do you understand the request made of you?

Mr. Flaxer. Yes; I do.

Senator Watkins. Do you stand on your statement that you refuse to produce those?

Mr. Flaxer. I didn't say I refused. I indicated
123 the situation is such that I find myself incapable of producing them. I think if I complied with a request of that kind, first of all I don't think I have the right either in terms of our membership or in terms of the labor movement generally—

Mr. Arens. But you do have the information?

Mr. Flaxer. In a general sense, I think I have the information.

Mr. Arens. And you have not complied with the command of the subpena to produce that information.

Mr. Flaxer. I think it is an improper command, sir.

Senator Watkins. That is the reason you have refused to bring them here today, because you think it is improper?

Mr. Flaxer. That is the reason I haven't got them.

Senator Watkins. That is the main reason. You are directed by the committee to produce those records according to the terms of the subpena.

Mr. Flaxer. Again I plead with the chairman and with the committee to reconsider the entire matter, because I think you are infringing on a right that workers in America have, including Federal employees. You are the Government. You are the employer. You are as an employer asking for membership lists. You want your own
124 employees to identify themselves as to their trade-union membership. This is something that has not been done in America for the past 10 or 15 years, and where it has been done, it has been condemned as an unfair labor practice. And I just don't believe, sir —

Senator Watkins. As I understand it, you do not claim any rights under the Taft-Hartley Act, because you have not complied with it, and the Government itself, I think, would be entitled to know of its employees whether or not they are members of a union.

Mr. Flaxer. Then I think they ought to ask the employees. I don't think they are entitled to know, sir. I don't think so. I think the Government as an employer ought to adhere to the general national policy on this question. The general national policy on this question is that an employer has no right to ask a union member whether he belongs to an organization even if he tells that union membership that he doesn't even have to tell him. There are cases on record, upheld by the Federal courts of the United States, where the employer is enjoined from asking a person whether he belongs to a union, even though there is no punishment attached to it.

Senator Watkins. I would not argue with you for employees outside of the Government service, or State,
125 county and municipal service. I am not going to argue that question because it is not at issue here. But we have here now an organization made up of people who are working for Government and we are asking you specifically for the names of those who are working for Government. You have that within your information and I do not think there is any law or any court holding that the United States itself cannot find out the names of a union and the people who belong to it that are in its employ.

Mr. Flaxer. Sir, I don't think the issue has ever come up before.

Senator Watkins. Maybe it has not, but I do not think any court would ever resolve itself against the United States finding out what organization its members belong to.

Mr. Arens. How long would it take you, Mr. Flaxer, to prepare the information which is called for in this subpena?

Mr. Flaxer. I don't know.

Mr. Arens. Could it be done in a week?

Mr. Flaxer. I imagine it could be done in a week.

Mr. Arens. I respectfully suggest to the chairman that the witness be ordered to produce the information and transmit it to the subcommittee in 10 days' time.

126 Senator Watkins. Since you have made the reply that it could be done in a week, that will be the order of the committee, that you submit that information as requested by counsel for the committee within 10 days from this date. The record will show that you of course have been given that notice and that requirement has been made, and the order has been made.

Mr. Flaxer. I would like to suggest to the committee to reconsider that. I think you ought to consider it in light of the facts that organized labor in America will recognize in this a break in the wall that they have built up over half a century against the initiation of blacklists. I don't think that these lists can be looked upon in any other light than as blacklists.

Mr. Adams. Who is the vice president of the United Public Workers of America?

Mr. Flaxer. We don't have a vice president.

Mr. Arens. Who are the national officers of the United Public Workers of America?

Mr. Flaxer. I am, and Mr. Ewart Guinier.

Senator Watkins. May I direct your attention to the fact that this is an executive session and the records are not public here unless the order of the committee is to make them public. But at least for the present
127 the records are to be delivered to the committee in executive session.

Mr. Flaxer. Sir, on that I don't see any good purpose that these records would serve, even if I were to produce them. I think they are wholly irrelevant, if you say they are not to be made public.

Senator Watkins. I am not promising you they would not be made public, because I do not think the Government has to make such a promise to get the information.

Mr. Flaxer. I think, with all due respect to the committee, you are infringing here on an area which just crosses the boundaries of individual rights as well as trade-union rights far beyond the contemplation of any—

Senator Watkins. Whatever your argument is, that is the order now, and, as I understand it, you refuse to do so on the ground you set forth. I want to make the record clear.

Mr. Flaxer. I haven't got them. I don't feel capable of producing them.

Senator Watkins. You said you could do it within a week.

Mr. Flaxer. No; that was not the question he asked. He asked could the list be compiled within a week and I said it could.

128 Mr. Arens. The information is available to you?

Mr. Flaxer. Yes.

Mr. Arens. But you have declined to produce it; is that correct?

Mr. Flaxer. I haven't produced them.

Mr. Arens. Will you produce it pursuant to the order of the chairman of this session within 10 days from today?

Mr. Flaxer. I will have to take that under consideration.

Senator Watkins. That is the order, and of course we will have to take whatever steps are necessary if at the end of the time you have not produced them.

(End of reading)

Mr. Marcantonio: I think that is all.

By Mr. Hitz:

Q. Mr. Arens, did Mr. Flaxer produce these records?

Mr. Marcantonio: Just a moment. I object, if the Court pleases, and may I be heard?

The Court: Yes.

Mr. Marcantonio: The question here is whether or not this defendant failed to produce these records on the 5th day of October. That is the charge in the indictment. The charge in the indictment is not that he failed to produce them within ten days after the 5th day of October.

129 Whether or not this defendant produced them after

the 5th day of October is not the question here. In other words, if he didn't produce them after the 5th day of October, the charge of contempt would be a contempt that will have taken place after the 5th day of October. Here the indictment specifically says that he failed to produce on the 5th day of October. That is the charge. And anything else that goes beyond that charge is not relevant to the issues of this case.

The Court: The objection is overruled. You may answer.

By Mr. Hitz:

Q. Mr. Arens, did Mr. Flaxer produce the records sought in the subpoena at the ten days extra time given him? A. No.

Q. From October 5th. Has the committee ever gotten this material from Mr. Flaxer?

Mr. Marcantonio: I make the same objection to that question.

The Court: The objection is overruled.

The Witness: No.

Mr. Hitz: You may examine.

Cross Examination

By Mr. Marcantonio:

Q. You say that these records were not received by you? A. I said the records were not received by the committee.

Q. By the committee. A. Or by me either. I can add that.

Q. Have you received any communication from Mr. Flaxer? A. No, sir.

Q. Since the 5th day of October? A. No, sir.

Q. Do you have any knowledge about his sending this information to you? A. Do I have any knowledge about him sending the information to me?

Q. That's right. A. No, I have no knowledge, and I am certain he did not.

Q. You say you are certain that he did not send them? A. Yes, sir.

Q. Is that what you are saying? A. Yes, sir.

Q. Or is it that you are certain that you did not receive it? A. Well, I would have to qualify it with saying I am certain that we did not receive them.

Q. But you have no knowledge as to whether or not
131 he sent them? A. I would have to, of course, agree that I don't know whether or not he sent them.

Q. Exactly. You don't know. A. That's correct.

. . . . . .

132 Mr. Hitz: We have completed our evidence, so I am prepared to rest at this time, so I would suggest that if you care to use Mr. Arens for any purpose, you can do it right now.

Mr. Rein: I would rather go ahead and argue the motion of acquittal first.

. . . . . .

133 Mr. Rein: If Your Honor please, I would like to open the argument for judgment of acquittal.

Mr. Hitz: Mr. Rein, May I state for the record, that we rest the case. I said we would rest it at the bench.

. . . . . .

166 The Court: At this time the Court overrules the motion for judgment of acquittal and will go on with the case. You may renew your motion later.

Mr. Marcantonio: In the light of Your Honor's—Your Honor said I may renew my motion at the end—when, please?

The Court: Later. I think the rules of criminal procedure provide for that.

Mr. Marcantonio: I understand that, if Your Honor please. But at this time, in the light of Your Honor's ruling, I now move that all evidence as to producing or not producing subsequent to October 5th be excluded, because that

ruling can be based only on the proposition that there was a default on October 5th.

The Court: Your motion is denied. Will you bring the jury back.

(The jury resumed the jury box.)

. . . . . .

169 Mr. Rein: We have a stipulation which would provide what the testimony would be of Senator Watkins
170 with regard to this letter and the testimony of Mr. Flaxer's secretary. It has been agreed, subject to objections as to relevancy, and unless Mr. Hitz has objection now, I would propose to read it to the jury.

Mr. Hitz: We object because it lacks materiality.

The Court: Do you mean what is in the letter is not material?

Mr. Hitz: Yes, Your Honor.

Mr. Rein: I think under Your Honor's ruling as to what happened subsequent to October 5th, this certainly is relevant, because it shows what the defendant did subsequent to October 5th—or at least part of what he did.

The Court: Then you don't enter into the stipulation?

Mr. Hitz: Yes, we enter into the stipulation, and it is that the two witnesses would testify as Mr. Rein has stated here, but we say that even so, what they testify about, that is this letter, is not material.

The Court: What is the effect of your objection? Do you object to the letter, is that it?

Mr. Hitz: Yes. The effect of the stipulation is to make the letter admissible without live testimony of either Mr. Flaxer or his secretary or Senator Watkins, and we do not resort to that technical objection. We say that the letter has no materiality anyway.

The Court: The letter really just states for the
171 most part exactly what he said at the hearing.

Mr. Rein: If Your Honor please, under our view what happened after October 5th is completely irrevelant

to this matter, and I would agree that the letter is irrelevant in that respect, but Your Honor has ruled that what has happened subsequent to October 5th is relevant, and I think the fact that he sent the letter to Senator Watkins October 13, stating his position, whatever that position may be, is certainly relevant on this matter, particularly since, in the letter he clearly asked the committee to consider this matter.

Mr. Hitz: Your Honor, I will withdraw my objection to the letter. I think on more consideration it helps us rather than hurts us. We will be glad to have it in.

The Court: Very well.

(Defendant's Exhibit No. 1, heretofore marked for identification was received in evidence.)

(In open court:)

Mr. Rein: Counsel for both sides have entered into a stipulation with regard to the testimony of certain witnesses, to the effect that if these witnesses were called to the stand they would testify as follows, and in accordance with the stipulation that testimony is to be given the same effect as if these witnesses were actually on the witness stand and testified to the things that I am going to read to you in this stipulation.

172 Mr. Hitz: Does this bear a defense number?

Mr. Rein: Would you like me to have this numbered as part of the record?

The Court: Very well.

The Deputy Clerk: Defendant's Exhibit No. 2.

(Subject document was marked Defendant's Exhibit No. 2 and received in evidence.)

Mr. Rein: (Reading) It is hereby stipulated by and between counsel and the parties herein as follows:

(1) If Senator Arthur V. Watkins were called to the stand, he would testify as follows:

(a) That he is the member of the subcommittee on internal security of the Senate committee on the judiciary

who conducted the hearing on October 5th, 1951, at which the defendant Abram Flaxer appeared.

(b) That he did not receive the letter of which a copy is attached hereto—and which I will read to you later—and that consequently he did not respond to such letter nor did he call it to the attention of the aforesaid subcommittee.

(c) That upon receipt of a subpoena directing that he produce the aforesaid letter, he caused his files to be searched and did not find the letter or any record of its receipt.

Then the stipulation goes on that,

173 If Ruth Blackwell of 241 West 24th Street, New York City, were called to the stand, she would testify as follows:

(a) That she is the secretary of Mr. Abram Flaxer, the defendant;

(b) That on October 13, 1951, she typed the original of the letter dated October 13, 1951, copy of which is attached hereto—and which I will read to you—that the letter was signed by the defendant in her presence; that she mailed the letter in a stamped envelope addressed to Senator Arthur V. Watkins, Senate Office Building, Washington, D. C., on October 13, 1951; that the envelope in which the letter was mailed had the return address of the United Public Workers of America, 5 Beekman Street, New York City, but that the letter was not returned to that address.

(End of reading of stipulation)

I would like to read the letter to you now. The letter bears the date of October 13, 1951. It is addressed to Senator Arthur V. Watkins, a member of the Subcommittee on Internal Security of the Committee on the Judiciary, Senate Office Building, Washington, D. C.

(Reading) Dear Sir: During the course of my hearing on October 5th, in response to the Committee's request that

174 I produce certain union records, including names and addresses of all members of our union who are employed by the federal government or who are em-

ployed by state, county, and municipal governments of the United States, I stated as follows:

"I have produced all the items called for in the subpoena except for one item. This item is the membership list of our union.

"The demand for the production of this item raises a number of profoundly serious issues.

"From the very beginning of the union movement in this country, the rights of unions to the privacy of their membership records has been one of the basic precepts to which the labor movement of America has adhered. Bitter experience has taught American labor that the right to join a Union is an empty right unless the fact of membership can be kept private.

"Throughout our history, employers and anti-labor groups have attempted to violate the secrecy of union records in order to compile blacklists for the sole purpose of destroying unions. This has been amply documented in the hearings of the LaFollette Committee. After bitter struggles in and out of the halls of Congress, labor has succeeded in enacting into law this right of privacy. Countless decisions of the National Labor Relations Board and
175 of our federal courts have upheld that right. Indeed, the mere query by an employer of an employee as to his union membership has been held to be an unfair labor practice even under the Taft Hartley Act.

"Every individual who joins a union joins it with the confidence and trust supported by tradition and law that the act of joining and maintaining membership is a personal right and freedom that is inviolate. A request such as the present constitutes a wholesale invasion of such privacy and 'the right to be let alone' which is protected by the Fourth Amendment. Every trade union member imposes a special trust in his union officers to protect and preserve that right. Therefore, to submit to the request in this subpoena would be a violation of the trust imposed in me by my membership and a betrayal of the entire tradition of

the trade union movement in this country. I have no doubt that not a single union president would find it possible to comply with such a request.

"I am confident that the members of this committee after considering my views and after a study of the full implications of the request made in this subpoena will realize its conflict with the basic union tradition of this country now incorporated into federal law and withdraw the demand for membership lists."

176 During the time that has elapsed since the date of that hearing, I have again given due consideration to the committee's request for those membership lists and have come to no other conclusion than that given to you on October 5th, as quoted above; and, therefore, again reiterate my request that the committee withdraw its demand for the membership lists.

Under separate cover I am sending you such records as I have with respect to the CIO "Trial" hearing. I regret to say that I have been unable to locate a transcript of that hearing, which has evidently been mislaid or lost during the course of the recent moving of our office to our present address. I am, however, confident that the committee can obtain this transcript from the National CIO headquarters, 718 Jackson Place, Washington, D. C.

Respectfully yours, Abram Flaxer, President.

(End of reading)

Mr. Marcantonio: The defendant rests.

* * * * * * * * * *

177 Mr. Marcantonio: I renew my motion for judgment of acquittal.

* * * * * * * * * *

179 The Court: Will counsel approach the bench, please.

(At the bench)

Mr. Marcantonio, with respect to your motion for judgment of acquittal with respect to Count 2 and in other re-

spects, I call your attention to this Rule 29 (b). It says, "If a motion for judgment of acquittal is made at the close of all the evidence, the Court may reserve decision on the motion, submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict."

Then it goes on to say if the motion is denied, that then it may be renewed within five days after the jury is discharged, and so forth.

Now you have made your motion for the second time. This time I am taking your motion under advisement, and we will go right on with the case. If the jury finds the defendant not guilty, that will end it; if the jury finds the defendant guilty, then the motion will be acted upon.

* * * * * * * * * * *

180 Mr. Rein: Would this be an appropriate time to discuss with you requested instructions, or do you want to wait until after argument?

The Court: No, if you have instructions, you are supposed to present them now, and give the other side a copy.

Mr. Rein: We did that during the luncheon recess. I have written them out, and I could read them. They are very brief. There are not very many. If we had a few minutes, I can show them to Mr. Hitz and we can look at them.

The Court: Do you want to take a few minutes to do that?

Mr. Hitz: Yes.

The Court: (To the jury) Ladies and gentlemen of the jury, I am going to give you a recess for about ten minutes. Pass out quietly and remember the usual admonition.

(Thereupon, the jury retired from the courtroom, and the following proceedings took place out of the jury's presence:)

Mr. Rein: Instruction No. 1—shall I read that?

The Court: What observations do you have?

Mr. Rein: That is the one about taking into consideration anything that happened after October 5th.

Mr. Hitz: We object to that on the theory that his refusal to produce ten days later, and his letter dated some eight days later, stating that he still took the same position, are matters to be considered, in whether or not he made
181 a final refusal on the 5th. I understood that he had been given a final command to produce.

Mr. Marcantonio: On that point, if I may be heard. We are in a dilemma. We don't know whether to proceed with two contempts or one contempt. If, as Mr. Hitz claimed, there are two contempts, and so I understood his argument, then certainly we have got to direct our arguments to the contempt on the 5th, and then the contempt when on the 15th or some time after the 5th. I don't know how it is possible for me to do it within the framework of this case.

The Court: I expect to tell them to determine it as of the 5th, and that if they find there was no refusal and willfull default on that date, that they must find him not guilty even though they believe that he defaulted at some other time.

Mr. Hitz: That's right. I believe that is the law.

The Court: I expect to tell them that.

Mr. Hitz: But isn't what he said and did afterwards an indication of what he understood and meant on the 5th? I don't believe it can be a crime they can convict of if he refused on the 15th and not on the 5th, but what he did later can reflect on the thought then.

Mr. Marcantonio: I think as Your Honor has very correctly framed the issue here, whether or not he refused on the 5th, that is the only question. What he did after
182 that can't have any bearing on whether or not he refused on the 5th. The question is whether or not there was any refusal on the 5th, whether there was a deliberate refusal on the 5th. That is the only question of

fact involved here in the face of this indictment. There is no other question of fact.

Let's assume for the sake of argument only, if this man complied, let's assume he submitted the records subsequent to the 5th. Would you say that would be a defense to an indictment for a refusal on the 5th if the jury actually found that there was a refusal on the 5th? Of course not. It is ridiculous.

The Court: In some of these cases an instruction has been given, "... whether the refusal and failure to produce was willfull and must be determined as of the time that the failure and refusal took place." What happened later has no bearing upon the issues of the case. Of course, when it is what a person says, it is usually what a person says at the time.

Mr. Marcantonio: What he says subsequent to the 5th hasn't any bearing.

Mr. Hitz: If that is true, the Court should instruct the jury to disregard the evidence as to what took place afterwards—the fact that he didn't produce ten days later and the fact that he intended whatever he intended by his letter of the 13th.

183. The Court: Then I think I will just give them this— "... whether the refusal and failure to produce was willfull and must be determined as of the time that the failure and refusal took place."

Mr. Hitz: On that theory a confession which has to be made after the crime would never be admissible—indications that a man had attempted to escape.

Mr. Marcantonio: You are not dealing with that situation, Mr. Hitz.

The Court: Any statement that he has made—what statement has he made?

Mr. Marcantonio: With reference to what he would do within ten days.

Mr. Hitz: His statement in that letter, I think, of the 13th, is helpful. It shows that he understood he was being

required to produce the papers on the 5th, and he said, "I reiterate my position that the committee should withdraw its illegal demand to produce the membership lists."

Mr. Marcantonio: In that letter he is stating his position with respect to the order given him on the 5th to produce within ten days. He is stating in that letter what he intends to do with regard to that order, and nothing else.

The Court: I do think that a person can make a statement.

Mr. Marcantonio: If the statement were a state-
184 ment as to what he did on the 5th.

The Court: You have offered that letter that you said he wrote.

Mr. Rein: We have offered it only because Your Honor ruled that it was relevant, and offered with that reservation if it was not relevant.

Mr. Marcantonio: Your Honor ruled, if Your Honor recalls—overruled my objection when I objected to the question, "Did you receive these records within the ten days," and Your Honor allowed the answer in, and he said no. It was on the basis of that that we put in this letter. If the fact that they did or did not receive the records within ten days is out, then our letter is out, too.

The Court: I think I will let the statement stay in, but I expect to tell them they have to determine it as of the time that the refusal took place, but that what is said subsequent to that time may be considered in connection with what the intent was at the time in so far as it throws any light on it, if it does.

Mr. Marcantonio: But, if Your Honor pleases, we are confronted here with a situation as to what happened on the 5th. On the 5th you have an objection by a witness and a ruling, and that's all you have on the 5th.

The Court: You have what?

Mr. Marcantonio: An objection by a witness and
185 a ruling—an objection to the production of the records, and a ruling. That's what you have on the

5th. What transpired subsequent thereto relates to the ruling, the due date of which was within ten days thereafter.

It is not part of the res gestae, it is not part of this case, unless they charge a separate count in the indictment with regard to the 15th.

Mr. Rein: It should be noted we offered this evidence only in the light of and commenting on the fact that it was irrelevant and only in the light of Your Honor's ruling that she would permit testimony to come in as to failure to produce the records. We made that comment at the time. We never would have offered the evidence—

Mr. Marcantonio: We protected ourselves in this record.

The Court: Very well, I have made the ruling that I am going to tell them whether the refusal and failure to produce was willfull must be determined as of the time that the failure and refusal took place, and that what happened later is immaterial and has no bearing upon the issues of the case, except that any statements made by the defendant may be considered in connection with whether there was or was not a failure to produce and whether the failure, in case there was one, was willfull or not.

Mr. Marcantonio: As of the 5th.

The Court: Yes.

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187 The Court: I am going to deny this No. 1.

Mr. Rein: Would it be permissible to read the one that you deny into the record now?

The Court: We usually put it in the record and just mark it.

Mr. Rein: In view of the fact that it is handwritten.

This is instruction No. 1 requested by the defendant, and which has been denied by the Court:

"The Court instructs you that the indictment charges that the defendant failed and refused to produce the rec-

ords at the hearing before the subcommittee on October 5, 1951. In considering whether or not the defendant was guilty of a willfull refusal on that date, you should not consider in any way whether the defendant did or did not produce the records at some time after October 5th, 1951.

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The Court: I think what I am saying in the charge covers the substance of it, anyway. That is all that you request?

Mr. Rein: That is all that we request.

The Court: That doesn't include the "action".

Mr. Hitz: All right.

Mr. Marcantonio: I didn't understand the last remark.

The Court: I said that includes any statements the defendant may have made.

Mr. Marcantonio: That directly bear on what he said on the 5th.

The Court: Yes.

Mr. Marcantonio: We have no such statements in the record, if Your Honor pleases.

Mr. Hitz: You have that letter. I don't know whether they believe that it was sent or not.

Mr. Marcantonio: That isn't the point. That letter by itself on its face deals with the order of the committee issued on the 5th. It doesn't deal with the order of the committee contained in the subpoena. It deals with the order of the committee given to them on the 5th to produce within ten days. That is what that letter deals with.

The Court: No, it deals with the occurrences on the 5th. It says it does, according to my recollection.

189

Mr. Marcantonio: My recollection of it is to the contrary. It deals with the order given to him to produce within the ten days. That is why he has directed the letter. He is asking them to reconsider that order. What order? Not the subpoena, but the order given to him by Senator Watkins on the 5th.

The Court: I have made the ruling now. We might as well go on our way.

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190 The Court: For the purpose of making everything clear, your motion for judgment of acquittal on all grounds is taken under advisement, and as to all counts.

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217 **Jury Charge**

The Court: Ladies and gentlemen of the jury, it now becomes your duty to determine whether the defendant is guilty or not guilty of the charges on which he is being tried.

As I have had occasion to tell you before, when a case is tried before a jury the Court consists of the judge and the jury. Each has a separate function and responsibility. It is the duty of the judge to preside at the trial, to pass on questions of law as they arise, including the admissi-
218 bility of evidence, and finally at this stage of the proceeding to instruct you with regard to the law applicable to the case.

It is the duty of the jury to determine the facts. You are the judges of the facts. You are the fact-finding body of the Court. It is for you to determine what the facts are, and after you have determined what the facts are, you are then to apply to those facts the law as given to you by the judge.

You are to determine what the facts are from the evidence in the case. The evidence in the case consists of the testimony of the witnesses here, the exhibits which have been shown to you or read to you, and the stipulation of counsel in the case. As I said, you are to determine what the facts are, from the evidence.

The fact that a defendant has been indicted is no indication of his guilt. The only purpose of an indictment is to inform a defendant of the charge or charges against him. An indictment is not evidence and it is not proof.

We have in our law what is called the presumption of innocence. This is a substantial right under our law. The presumption of innocence in this case means that the law presumes that the defendant did not fail and refuse to produce the records in question and did not willfully make default. This presumption of innocence should continue and prevail in the minds of the jury in such a way as will
219 cause them to find the defendant not guilty, unless from all the evidence in the case the jury are convinced beyond a reasonable doubt that the defendant did fail and refuse to produce the documents or records in question and did willfully make default as charged in the indictment.

The burden of proof is upon the Government to establish the guilt of the defendant beyond a reasonable doubt. This burden continues from the beginning to the end of the trial. The defendant is under no obligation to convince you of his innocence or to produce any evidence here. It is the responsibility of the prosecution to prove that the defendant is guilty beyond a reasonable doubt. A reasonable doubt is such a doubt as would leave a juror's mind, after a careful, candid and impartial consideration and comparison of all the evidence so undecided that he cannot say that he has an abiding conviction of the defendant's guilt.

Stat[illegible] another way, it is such a doubt as would cause a reasonable or prudent man to hesitate or pause in the graver or more important transactions of life. However, it is not a whimsical doubt nor a fanciful doubt nor a doubt based upon groundless conjecture. It is a doubt, as the name implies, which is based upon reason, and which is reasonable in view of the evidence in the case or the lack of evidence in the case.

It does not mean that the Government is required
220 to establish the defendant's guilt to a mathematical or absolute certainty. But the burden upon the Government is to establish the guilt of the accused beyond a reasonable doubt.

The law says that if you have a reasonable doubt the defendant is entitled to the benefit of that doubt, and if you have such a doubt, is to be found not guilty. If, after an impartial comparison and consideration of all the evidence in the case you can truthfully say to yourself that you are not satisfied of the defendant's guilt, then you have a reasonable doubt. But if, after such impartial comparison and consideration of all the evidence in the case, you can candidly say to yourself that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty matters of life relating to your own affairs, then you have no reasonable doubt.

You are not only the judges of the facts in this case, but you are the judges of the credibility of the witnesses. That means that you are to determine the weight and credit to be given to the testimony of each witness who has appeared here.

In determining the credibility of a witness you may consider the demeanor of the witness on the witness stand, whether the witness impressed you as a truth-telling individual or the contrary, whether the witness impressed you as having an accurate memory and recollection.

221 You may take into consideration the reasonableness or unreasonableness of the testimony of a witness, the probability or improbability of the testimony.

Finally, the law leaves to your good, sound judgment the credit and weight to be given to the testimony of each witness who appeared here before you.

The prosecution here was instituted under a law commonly known as the contempt of Congress statute. The provisions of that law, so far as they are material, are short and simple. They read as follows, as far as material in this case:

Every person who, having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry

before either House of Congress or any committee of either House of Congress, willfully makes default, shall be guilty of a misdemeanor.

The indictment in this case was brought under that law. Pursuant to Senate Resolution 366, the Eighty-First Congress, there was created a subcommittee on internal security of the Committee on the Judiciary of the United States Senate. This subcommittee is authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation and enforcement of other laws relating to
222 espionage, sabotage and the protection of the internal security of the United States; and, (3) the extent, nature and effects of subversive activities in the United States, its Territories and possessions, including but not limited to espionage, sabotage and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world communist movement or any other movement seeking to overthrow the Government of the United States by force and violence."

The resolution further provides that the committee or duly authorized subcommittee is authorized to sit and act at such places and times during sessions, recesses and adjourned period of the Senate, to hold such hearings, to require by subpoenaes or otherwise the attendance of such witnesses, and the production of such books, papers and documents, to administer such oaths, to take such testimony, to procure such printing and binding and to make such expenditures as it deems advisible within the amount appropriated therefore, and that subpoenaes shall be issued by the chairman of the committee or the subcommittee and may be served by any person designated by such chairman.

Now we come to the specific charges against the defendant. The indictment alleges that the defendant, Abram Flaxer, was summoned as a witness by the duly authorized subcommittee on internal security of the Committee
223 on the Judiciary of the United States Senate, to appear and produce before said subcommittee on October 5, 1951, certain records upon the matter under inquiry before the said subcommittee, that is, to produce records, among others, of the United Public Workers of America, showing (1) names and addresses for all members who are employed by the Federal Government of the United States of America; and (2) names and addresses of all members who are employed by any state, county, or municipal government located anywhere within the United States.

Count 1 charges that the defendant appeared before the said subcommittee on October 5, 1951, in the District of Columbia, but willfully failed and refused to produce the records called for showing the names and addresses of all members who are employed by the Federal Government of the United States, and thereby willfully made default. That, as I said, is the charge in Count 1.

Count 2 charges that the defendant appeared before the said subcommittee on October 5, 1951, in the District of Columbia, but willfully failed and refused to produce the records showing the names and addresses of all members who are employed by any state, county, or municipal government located anywhere in the United States, and thereby willfully made default. That, as I said, is the charge in Count 2 of the indictment.

The Court instructs you as a matter of law that
224 the subcommittee on internal security of the Committee on the Judiciary of the United States Senate was a validly constituted subcommittee of Congress.

Certain of the elements involved in the charge in the indictment present questions of fact to be determined by the jury. Some of them present matters for the Court's consideration—that is, for the Judge's consideration.

In the first place, the prosecution has the burden of proving to the satisfaction of the jury, beyond a reasonable doubt, that the defendant was summoned as a witness to appear before the committee, and that the summons or subpoena was served on the defendant to appear and produce certain designated papers. The evidence on that was that the subpoena was issued by the chairman of the committee and that it was served on the defendant in New York City. A copy of the subpoena is in evidence, and it indicates the papers the defendant was to produce.

One of the elements or points set forth in the indictment is that the documents or records referred to in the subpoena touched on a matter that was under inquiry before the committee. The Senate resolution which I have already referred to outlines the matters of inquiry committed to the subcommittee. Whether the documents referred to in the subpoena touched on a matter under inquiry before the subcommittee is a question of law.

225 As you know, the Judge determines questions of law.

I now instruct you that the subcommittee had authority to obtain from the defendant the information requested in the subpoena in evidence here. In other words, the documents were pertinent to the study and investigation that the subcommittee was making.

Also, I instruct you that there was a quorum of the committee.

I caution you that my ruling as a matter of law on this matter of pertinency and quorum should not influence you in determining the other questions or elements involved.

It is undisputed here that the defendant did appear before the subcommittee in the District of Columbia on October 5, 1951. The remaining elements or questions for you to decide are whether the defendant made default—that is, did he fail or refuse to produce documents on October 5, 1951, mentioned in the subpoena and in the indictment. And if he did make default, was the default willful.

You will recall that I read to you the provisions of the contempt of Congress statute. That is the law under which the indictment here was drawn. A mere failure or omission by this defendant to produce when he was before the subcommittee on internal security of the Committee on the Judiciary the records specified in the subpoena which had been served upon him does not alone and of itself constitute the crime of contempt with which he is charged in the
226 indictment. No default constitutes the offense under the law unless it is willful.

Now, what is meant by the term "willful"? By the term "willful" is meant that the failure and refusal to produce papers called for was not accidental, was not inadvertent, but was deliberate and intentional. The word "willful" may also mean conduct marked by careless disregard of or plain indifference to the requirements of the statute.

The word "willful" does not mean that the failure or refusal to comply with the committee's order must necessarily have been an evil or a bad purpose. The reason or purpose for failure or refusal to comply is immaterial so long as the refusal is deliberate and intentional and is not a mere inadvertence or an accident. Even if a person believes that he has a legal right to refuse to produce those documents, if that belief is erroneous, that circumstances would be immaterial, for no one has a right to decide for himself what his legal duties are.

On the issue of willfulness, you are reminded that willfulness, being a state of mind, ordinarily cannot be proven directly. It is impossible to see the operation of the human mind. But willfulness or lack of willfulness may be inferred from circumstances. Willfulness or lack of willfulness may be deduced from a person's conduct, from the things that he does, from the things that he says, or from the
227 surrounding circumstances.

You are instructed that Mr. Flaxer, the defendant, cannot make default unles he was able at the time of his appearance before the committee to produce the papers.

You cannot convict him unless you believe from the evidence beyond a reasonable doubt not only that he failed or refused to produce these papers, but that he could have produced them if he had wanted to.

Under the law which is involved here, the questions for the jury to determine are, first, did the defendant on October 5, 1951, fail or refuse to produce any documents or records that he was lawfully directed to produce by the Congressional committee; and, second, if so, was the defendant's failure to produce any of these records willful, bearing in mind the definition of "willful" which I have given to you.

As I said, whether there was a default on October 5, 1951, when the defendant appeared before the subcommittee, and if so, whether it was willful are within the matters for the jury to determine. These are matters of fact which are exclusively within your province to determine.

The date and place specified in the indictment for the alleged default is October 5, 1951, in the District of Columbia. In other words, you are to determine whether on that date, October 5, 1951, the defendant appeared before
228 a subcommittee and then willfully failed and refused to produce the documents and then willfully did make default.

If you find that he did not willfully make default at that time and place—that is, on October 5, 1951—then your verdict would be not guilty, even though you may believe that at some other time that he did willfully default. In other words, the question before you is whether there was a willfull default on October 5, 1951, when he appeared before the committee.

At the request of the attorney for the defendant the Court instructs you that you cannot find that the defendant willfully and deliberately refused to produce the records called for by the subpoena unless you first find that the defendant clearly understood that the subcommittee had rejected the arguments advanced by the defendant and re-

quired him to produce the records on October 5, 1951, despite those arguments.

Whether the refusal and failure to produce was willful must be determined as of the time that the failure and refusal took place, and that time is specified in the indictment as October 5, 1951. What happened later is immaterial and has no bearing upon the issues of this case except as it may reflect on what the defendant did on October 5, 1951; that is, whether there was a refusal or was not a refusal to produce the records on October 5th, and if there was
229 a refusal, whether the refusal was willful or otherwise.

I call to your attention a rule of law that in weighing the evidence, if the acts and conduct of the defendant are just as consistent with innocence as it is with guilt, then he is entitled to the benefit of the presumption of innocence.

As to Count 1, you are instructed that if you should find to your satisfaction from the evidence and beyond a reasonable doubt that the defendant was summoned as a witness to appear before the subcommittee on internal security of the Committee on the Judiciary in the District of Columbia on October 5, 1951, and to bring with him records showing the names and addresses for all members of the United Public Workers of America, who are employed by the Federal Government of the United States, that those documents touched on a matter that was under inquiry before the committee, and that there was a quorum, and that the defendant appeared at that time and place but made default in that he failed and refused to produce the records demanded, and that such default or failure on the defendant's part was willful, then your verdict under those circumstances would be guilty as to Count 1. Otherwise, your verdict as to Count 1 would be not guilty.

As to Count 2, if you should find to your satisfaction from the evidence, and beyond a reasonable doubt, that the defendant was summoned as a witness to appear be-
230 fore the subcommittee on internal security of the

Committee on the Judiciary in the District of Columbia on October 5, 1951, and to bring with him records showing the names and addresses for all members of the United Public Workers of America who are employed by any state, county or municipal government located anywhere in the United States, that those documents touched on a matter that was under inquiry before the committee, and that there was a quorum, and that the defendant appeared at that time and place but made default in that he failed and refused to produce the records demanded, and that such default or failure on the defendant's part was willful, then under those circumstances your verdict would be guilty as to Count 2. Otherwise, your verdict would be not guilty as to Count 2.

If you believe that the defendant is innocent of one or both of the charges in the indictment, or if you have a reasonable doubt of the guilt of the defendant as to either or both of the charges, or if you have a reasonable doubt of the willfulness of the defendant's default as to either or both counts, if there was a default, or if you find that the prosecution has failed to establish to your satisfaction beyond a reasonable doubt each and all the material elements of either or both of the offenses charged in the indictment as I have outlined them to you, then under those circumstances it would be your duty to find the defendant not guilty as to such count or counts.

231 You will recall that statements were made to you in the nature of arguments or opening statements with reference to the case, by the attorneys in the case. Now, what the lawyers say in the case is not evidence. When you go to the jury room you will be permitted to take with you the indictment in the case, but you are to bear in mind that the indictment is not evidence in the case.

Your verdict, as you know, is to be unanimous, and you should have a separate verdict on each count. And as to each count your verdict may be either guilty or not guilty.

In considering the instructions which have been given

to you by the Court, you are to consider them in their entirety, you are not to single out some particular instruction and accentuate that and overlook others, but you are to consider them as a whole.

Is there anything further?

Mr. Marcantonio: May we approach the bench.

(At the bench:)

Mr. Marcantonio: I wanted to interpose the objection to Your Honor's reading of the resolution. We feel that the reading of the language of the resolution may have prejudiced the jury against the defendant, that a decision on Your Honor's part simply resolving that the information requested was pertinent would have been sufficient.

* * * * * * * * * *

235 The Deputy Clerk: Madam Foreman, has the jury agreed upon a verdict?

The Foreman: We have.

The Deputy Clerk: What say you as to the defendant Abram Flaxer.

The Foreman: Guilty.

The Deputy Clerk: Members of the jury, your—

The Court: You didn't mention the two counts.

236 The Deputy Clerk: I am sorry, your Honor. Madame Foreman, has the jury agreed upon a verdict?

The Foreman: We have.

The Deputy Clerk: What say you as to the defendant Abram Flaxer on Count 1?

The Foreman: Guilty.

The Deputy Clerk: On Count 2.

The Foreman: Guilty.

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239 Mr. Marcantonio: I move to set aside the verdict on the ground it is against the weight of evidence. The instructions Your Honor gave to the effect that this defendant, in order to find him guilty beyond a reasonable doubt, the defendant had to understand the committee di-

rection to be that he was to produce these records on October 5th— that is the committee direction, after arguments —how any jury could find the defendant guilty under those circumstances, in the face of that charge, is beyond me. The evidence is all to the contrary. The record specifically shows where Senator Watkins definitely told the defendant that he had to produce these records within ten days. That was his decision. There isn't a single iota of evidence that sustains a contrary position, not a single bit.

In the light of that charge, and in the light of the fact that there is absolutely no evidence, whatsoever—the
240 charge is before Your Honor—that there isn't a single iota of evidence to sustain the position that this witness could have understood the committee to have ordered him to produce the records on October 5th, not a single iota of evidence—

The Court: The Court has taken under advisement your motion for a judgment of acquittal. • • •

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[File endorsement omitted]

IN

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,027

ABRAM FLAXER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided June 21, 1956

Mr. David Rein, with whom *Mr. Joseph Forer* was on the brief, for appellant.

Mr. John D. Lane, Assistant United States Attorney, with whom *Messrs. Leo A. Rover*, United States Attorney at time of argument, and *Lewis Carroll* and *William Hitz*, Assistant United States Attorneys, were on the brief, for appellee.

Before EDGERTON, Chief Judge, and PRETTYMAN, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON and DANAHER, Circuit Judges, sitting *en banc*. (Circuit Judges BASTIAN and BURGER took no part in the consideration or decision of this case.)

OPINION—Decided June 21, 1956

WILBUR K. MILLER, *Circuit Judge:* Indicted under 2 U. S. C. § 192[1] for willfully failing and refusing to pro-

[1] The statute is as follows:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter

duce at a Senatorial subcommittee hearing on October 5, 1951, certain records required of him by a subpoena *duces tecum* and found guilty by a jury, Abram Flaxer appeals.

The appellant was president of the United Public Workers, a union made up of employees of Federal, state and local governments. In 1951 the Subcommittee on Internal Security of the Senate Committee on the Judiciary received information indicating that he and the other national officer of the union and certain of its directors were members of the Communist Party. Since the organization was therefore apparently dominated at the top by communists, the subcommittee decided to conduct an investigation as to whether its membership was infiltrated by them. To that end, a subpoena *duces tecum* was directed to Flaxer, commanding him to appear before the subcommittee on October 5, 1951, and to bring with him, *inter alia*, a list of the union's members showing which were employed by the Federal Government and which by other governmental units.

The subpoena was served on Flaxer September 19, some two weeks before the date of the hearing. He appeared before the subcommittee on October 5 but did not bring with him the classified membership list, which he said he could have compiled in a week's time. Instead, he read to the subcommittee a previously prepared written statement setting forth his reasons for not obeying the subpoena in that respect, after which Senator Wat-

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under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

kins (who constituted the subcommittee) directed him nevertheless immediately to produce the required records. He did not do so, and obviously he could not then have produced the list, even had he been disposed to obey after his objections had been overruled, because he had disabled himself by not preparing it in advance. Then, since it was physically impossible for Flaxer to file on that day the list he had not assembled and which it would take him a week to prepare, the Senator ordered him to submit it within ten days. Flaxer responded that he would "have to take that under consideration." He did not submit the membership list to the subcommittee within ten days thereafter, and has never submitted it.

Following the hearing on October 5, the subcommittee filed Report No. 1336 as to Flaxer's contempt in refusing to answer certain questions and in failing and refusing to obey the subpoena *duces tecum*. The Senate adopted a resolution that the Report be certified "under the seal of the United States Senate, to the United States Attorney for the District of Columbia to the end that said Abram Flaxer may be proceeded against in the manner and form provided by law." Senate Resolution 295, 82d Cong., 2d Sess., adopted March 19, 1952.

Thereafter Flaxer was indicted for violating the Code provision to which we have referred by willfully failing and refusing to produce on October 5, 1951, the membership list called for by the subpoena. At his trial, the counsel who had interrogated him on this subject at the hearing was the only witness. Testifying for the Government, he read into the record the portion of the transcript of the appellant's testimony before the subcommittee which had to do with Flaxer's non-compliance with the subpoena *duces tecum*. The appellant did not testify in his own behalf. In charging the jury the trial judge submitted the question whether, *on October 5, 1951*, Flaxer willfully failed and refused to produce the records required by the subpoena. The verdict was that he com-

mitted the offense on that day as charged in the indictment.

As a reason for reversal the appellant says he was not *ordered* on October 5 to produce the records at the hearing then being conducted and that therefore under the *Quinn* and *Bart* cases[2] he could not be found guilty of a willful disregard of the subpoena, and was entitled to a judgment of acquittal. With respect to this the appellant says in his brief:

> Accordingly, the issue before the trial court was whether the appellant was guilty of contempt of the command contained in the subpoena by virtue of his conduct at the October 5 hearing. Manifestly, he was not. Under the doctrine of the *Quinn* and *Bart* cases, *supra*, the appellant could not be found guilty of a wilful default of the subpoena unless, after consideration of his objections to the validity of the subpoena, he was directed to produce the records. But he was not so directed. On the contrary, he was told that he need not produce the records then and there but should produce them within ten days. The appellant replied that he would take that order under consideration. In effect, the order contained in the subpoena was vacated, and a new order substituted. The issue of appellant's compliance with this new order is not involved, since the appellant was neither indicted nor tried for a failure to carry out that order. Since there was no direction to produce the records at the hearing, there was consequently no wilful default of the command contained in the subpoena.

The record not only does not support the purportedly factual statements in the above quotation from appellant's brief, but is directly to the contrary. After consideration of his objections to the validity of the subpoena, Flaxer was unmistakably directed to produce the membership list. He was not told he need not produce

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[2] Bart v. United States, 349 U. S. 219 (1955); Quinn v. United States, 349 U. S. 155 (1955).

the list then and there; the record will be searched in vain for even an intimation to that effect. When Flaxer had completed a lengthy statement of his objections, the following occurred at the hearing:

> Mr. Arens [counsel for the subcommittee]. But you do have the information?
>
> Mr. Flaxer. In a general sense, I think I have the information.
>
> Mr. Arens. And you have not complied with the command of the subpena to produce that information.
>
> Mr. Flaxer. I think it is an improper command, sir.
>
> Senator Watkins. That is the reason you have refused to bring them here today, because you think it is improper?
>
> Mr. Flaxer. That is the reason I haven't got them.
>
> Senator Watkins. That is the main reason. You are directed by the committee to produce those records *according to the terms of the subpena*. [Our emphasis.] [*]

The Senator could hardly have more clearly directed Flaxer, notwithstanding his objections, to produce the records on October 5. The direction was given in conscious compliance with the requirement of the *Quinn* and *Bart* cases, as Senator Watkins knew that Flaxer was unable to obey then and there because he had deliberately failed to prepare himself to do so. In fact, the witness had already said, "I have no such list with me." We conclude that, since there was an express direction to submit the membership list given after Flaxer's objections had been considered, he could be convicted of violating § 192.

The question is then whether the proof justified the jury's verdict that the appellant was in willful default on October 5. That his contumacy was complete on that day is clearly shown by his own testimony before the subcommittee. He testified he did not bring with him the membership records as the subpoena had commanded.

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[*] Official Reporter's Transcript, page 128.

Did he willfully fail to bring them, as the jury concluded? His own words and conduct answer the question in the affirmative. He could have compiled the membership list prior to the hearing, so that he might be ready to obey the subpoena should the subcommittee reject his objections and direct him to produce the records. He deliberately refrained from making the compilation, from which it is apparent that he had decided in advance he would not obey in any circumstances. He stated at the hearing that he regarded "as an improper command" the subpoena's direction that he bring the records. "That is the reason I haven't got them," he said. This was deliberate and defiant contempt of the United States Senate on October 5, 1951.

It was not until after the appellant had been directed, despite his protest, to produce the records according to the terms of the subpoena, that the chairman ordered him to assemble the information and transmit it to the subcommittee in ten days. Obviously this was because the subcommittee still wanted the information which had been contemptuously withheld from it at the hearing. But the chairman nowhere receded from his earlier ruling that the subpoena was to be complied with, which ruling was given after the witness had said he did not have the records with him. Senator Watkins said nothing which can be construed as excusing or condoning Flaxer's contempt — already complete — in disobeying the subpoena.*

If Flaxer had demonstrated good faith by compiling the membership records and sending them to the subcommittee within ten days, perhaps he would not have been indicted for his initial contempt. On that supposi-

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* In order to show the sequence of events and what actually happened at the hearing, we reproduce in an appendix to this opinion pertinent portions of Flaxer's testimony before the subcommittee regarding his failure and refusal to obey the subpoena with respect to the membership list.

tion some may think Senator Watkins—although he did not promise immunity in that event—was affording Flaxer an opportunity to purge himself of contempt. If so, it was an opportunity the appellant did not embrace. He remained recalcitrant, thus affirming and emphasizing the contempt he had originally displayed. That he may have committed another contempt in addition to that of October 5 would seem to be irrelevant.

We next consider the appellant's contention that he was entitled to a judgment of acquittal on his theory that a quorum of the subcommittee did not rule upon his objections to the validity of the subpoena. Senate Resolution 366,[5] which established the subcommittee, authorized it to provide that less than a majority should constitute a quorum "for the purpose of administering oaths and taking sworn testimony," and the subcommittee had decided that one member should constitute a quorum for that purpose. Flaxer argues that the authority to administer oaths and take sworn testimony does not include the authority to rule upon the validity of a subpoena.

The power to receive sworn testimony of course includes authority to rule on objections to questions asked the witness. Receiving documents is obviously a normal ancillary to taking testimony. Professor Wigmore says:[6]

> This testimonial duty to attend and disclose all that is needed for the ascertainment of truth applies to *every form and material of evidence* whatever.
>
> In particular it applies to such evidential material as exists in a person's hands in the form of *documents*. "There is no difference in principle," said a great judge [Shaw, C. J., in Bull v. Loveland, 10 Pick. 9, 14 (1830)], "between compelling a witness to produce a document in his possession, under a subpoena 'duces tecum' (in a case where the party calling the witness has a right to the use of such

[5] 81st Cong., 2d Sess. (1950).

[6] 8 WIGMORE, EVIDENCE § 2193 (3d ed. 1940).

> document), and compelling him to give testimony when the facts lie in his own knowledge." This much is unquestionable; for to give up facts possessed by physical control is no different from the giving up of data possessed as mental impressions.

We think authority to receive sworn testimony includes not only authority to rule on objections to questions but on objections to a subpoena *duces tecum* as well.

In considering appellant's further argument that the pertinency of the membership list called for by the subpoena was not established, it is essential first to ascertain what the subcommittee had been authorized and directed to do, and what it was doing or attempting to do in the hearing of October 5.

The Senate in 1950 authorized and directed its Committee on the Judiciary, or any duly authorized subcommittee, to study and investigate, among other things, the

> . . . extent, nature and effects of subversive activities in the United States . . . including but not limited to espionage, sabotage and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world communist movement or any other movement seeking to overthrow the Government of the United States by force or violence . . . .

The Committee was also directed to study the operation of the Internal Security Act of 1950 and other laws dealing with internal security.[7] In accordance with this authorization and direction there was created, in January, 1951, the Subcommittee on Internal Security.

In § 2 of the Subversive Activities Control Act of 1950[8] Congress graphically appraised the activities and

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[7] S. RES. 366, 81st Cong., 2d Sess. (1950), S. RES. 198, 82d Cong., 1st Sess. (1951) (continuing S. RES. 366).

[8] Title I of the Internal Security Act of 1950, 64 STAT. 987, 50 U. S. C. § 781.

purposes of the world communist "movement" and concluded that our form of government is in clear and present danger therefrom.* It was because of Congressional alarm reflected in that Act and other recent legislation that the subcommittee was authorized to study and investigate the extent, nature and effects of subversive activities, including the infiltration of labor organizations by persons who are or may be under communist domination. Against such a background, the pertinency of the membership list demanded by the subpoena is at once apparent. Cf. *Barsky* v. *United States,* 83 U. S. App. D. C. 127, 132, 167 F. (2d) 241, 246, *cert. denied* 334 U. S. 843 (1948); *Marshall* v. *United States,* 85 U. S. App. D. C. 184, 176 F. (2d) 473 (1949), *cert. denied* 339 U. S. 933 (1950). The names could be used to check against a list of subversives to determine the extent of infiltration into the union, a matter clearly pertinent under the Resolution, particularly since this is a Government employees' union even though the names of state and local members are included. Regardless of where they were employed, the names of members were pertinent because an investigation of the union was pertinent.

As a final reason for reversal, appellant points out that the indictment charged him with refusing to produce certain records of the United Public Workers of America; that the subpoena served on him in fact called upon him to produce the records of the United Professional Workers of America. This variance, says Flaxer, between the allegation in the indictment and the subpoena actually served on him was in itself fatal to the prosecution and required a judgment of acquittal. The point is frivolous, since Flaxer himself called attention to the inadvertent

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* This was held to dispense with the need for proof—in a deportation case where the question was pertinent—that the Communist Party advocates the violent overthrow of the Government. Galvan v. Press, 347 U. S. 522, 529-530 (1954).

use of the word "Professional" for the word "Public" in naming the union in the subpoena. He said, "I want to make a minor correction there. Our union is the United Public Workers. . . . Your subpena stated 'Professional Workers.' I recognized it was an error in your identification."

We hold that Flaxer was fairly tried and that his guilt was clearly shown. The judgment pursuant to the verdict must stand.

Affirmed.

APPENDIX

Official Reporter's Transcript, pages 113-116:

> Mr. Flaxer. . . . The item which I have not produced is the item on membership lists of our union. The demand for the production of this item raises a number of profoundly serious issues. From the very beginning of the union movement in this country, the rights of unions to privacy of their membership records—
>
> Mr. Arens. You are reading from a prepared statement?
>
> Mr. Flaxer. Yes.
>
> Mr. Arens. Who prepared the statement?
>
> Mr. Flaxer. I did. (Continues:) Has been one of the basic precepts to which the labor movement of America has adhered. Bitter experience has taught American labor that the right to join a union is an empty right unless the fact of membership can be kept private.
>
> Throughout our history, employers and antilabor groups have attempted to violate the secrecy of union records in order to compile blacklists for the sole purpose of destroying unions. This has been amply documented in the hearings of the La Follette committee. After bitter struggles in and out of the Halls of Congress, labor has succeeded in enacting into law this right of privacy. Countless decisions of the

National Labor Relations Board and of our Federal courts have upheld that right. Indeed, the mere query by an employer of an employee as to his union membership has been held to be an unfair labor practice even under the Taft-Hartley Act.

Every individual who joins a union joins it with the confidence and trust supported by tradition and law that the act of joining and maintaining membership is a personal right and freedom that is inviolate. A request such as the present [one] constitutes a wholesale invasion of such privacy and "the right to be let alone" which is protected by the fourth amendment. Every trade-union member imposes a special trust in his union officers to protect and preserve that right. Therefore, to submit to the request in this subpena would be a violation of the trust imposed in me by my membership and a betrayal of the entire tradition of the trade-union movement in this country. I have no doubt that not a single union president would find it possible to comply with such a request.

I am confident that the members of this committee, after considering my views and after a study of the full implications of the request made in this subpena, will realize its conflict with the basic union tradition of this country now incorporated into Federal law and withdraw the demand for membership lists.

Mr. Arens. Do you have such a list?

Mr. Flaxer. I have no such list with me.

Mr. Arens. Do the records of the United Professional Workers reflect such a list? Is the information available, in other words?

Mr. Flaxer. I want to make a minor correction there. Our union is the United Public Workers.

Mr. Arens. I meant the United Public Workers.

Mr. Flaxer. Your subpena stated "Professional Workers." I recognized it was an error in your identification.

Mr. Arens. Did the United Public Workers' organization have the information available which is called for in the subpena?

Mr. Flaxer. Well, we generally have such information.

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Official Reporter's Transcript, pages 122-128:

Mr. Arens. Mr. Chairman, I respectfully ask of the chairman that the witness be ordered to produce for this record, in compliance with the subpena duces tecum served upon him, the record[s] of the United Public Workers who are employed by the Federal Government of the United States of America, and records showing the names and addresses of all members who are employed by any State, county, or municipal government located anywhere in the United States of America.

Senator Watkins. Do you understand the request made of you?

Mr. Flaxer. Yes; I do.

Senator Watkins. Do you stand on your statement that you refuse to produce those?

Mr. Flaxer. I didn't say I refused. I indicated the situation is such that I find myself incapable of producing them. I think if I complied with a request of that kind, first of all I don't think I have the right either in terms of our membership or in terms of the labor movement generally—

Mr. Arens. But you do have the information?

Mr. Flaxer. In a general sense, I think I have the information.

Mr. Arens. And you have not complied with the command of the subpena to produce that information.

Mr. Flaxer. *I think it is an improper command, sir.*

Senator Watkins. That is the reason you have refused to bring them here today, because you think it is improper?

Mr. Flaxer. *That is the reason I haven't got them.*

Senator Watkins. That is the main reason. *You are directed by the committee to produce those records according to the terms of the subpena.*

Mr. Flaxer. Again I plead with the chairman and with the committee to reconsider the entire matter, because I think you are infringing on a right that workers in America have, including Federal employees. You are the Government. You are the employer. You are as an employer asking for mem-

bership lists. You want your own employees to identify themselves as to their trade-union membership. This is something that has not been done in America for the past 10 or 15 years, and where it has been done, it has been condemned as an unfair labor practice. And I just don't believe, sir——

Senator Watkins. As I understand it, you do not claim any rights under the Taft-Hartley Act, because you have not complied with it, and the Government itself, I think, would be entitled to know of its employees whether or not they are members of a union.

Mr. Flaxer. Then I think they ought to ask the employees. I don't think they are entitled to know, sir. I don't think so. I think the Government as an employer ought to adhere to the general national policy on this question. The general national policy on this question is that an employer has no right to ask a union member whether he belongs to an organization even if he tells that union membership that he doesn't even have to tell him [*sic*]. There are cases on record, upheld by the Federal courts of the United States, where the employer is enjoined from asking a person whether he belongs to a union, even though there is no punishment attached to it.

Senator Watkins. I would not argue with you for employees outside of the Government service, or State, county and municipal service. I am not going to argue that question because it is not at issue here. But we have here now an organization made up of people who are working for Government and we are asking you specifically for the names of those who are working for Government. You have that within your information and I do not think there is any law or any court holding that the United States itself cannot find out the names of a union and the people who belong to it that are in its employ.

Mr. Flaxer. Sir, I don't think the issue has ever come up before.

Senator Watkins. Maybe it has not, but I do not think any court would ever resolve itself against the United States finding out what organization its members belong to.

Mr. Arens. How long would it take you, Mr.

Flaxer, to prepare the information which is called for in this subpena?

Mr. Flaxer. I don't know.

Mr. Arens. Could it be done in a week?

Mr. Flaxer. I imagine it could be done in a week.

Mr. Arens. I respectfully suggest to the chairman that the witness be ordered to produce the information and transmit it to the subcommittee in 10 days' time.

Senator Watkins. Since you have made the reply that it could be done in a week, that will be the order of the committee, that you submit that information as requested by counsel for the committee within 10 days from this date. The record will show that you of course have been given that notice and that requirement has been made, and the order has been made.

Mr. Flaxer. I would like to suggest to the committee to reconsider that. I think you ought to consider it in light of the facts that organized labor in America will recognize in this a break in the wall that they have built up over half a century against the initiation of blacklists. I don't think that these lists can be looked upon in any other light than as blacklists.

Mr. Arens. Who is the vice president of the United Public Workers?

Mr. Flaxer. We don't have a vice president.

Mr. Arens. Who are the national officers of the United Public Workers of America?

Mr. Flaxer. I am, and Mr. Ewart Guinier.

Senator Watkins. May I direct your attention to the fact that this is an executive session and the records are not public here unless the order of the committee is to make them public. But at least for the present the records are to be delivered to the committee in executive session.

Mr. Flaxer. Sir, on that I don't see any good purpose that these records would serve, even if I were to produce them. I think they are wholly irrelevant, if you say they are not to be made public.

Senator Watkins. I am not promising you they would not be made public, because I do not think the Government has to make such a promise to get the information.

Mr. Flaxer. I think, with all due respect to the committee, you are infringing here on an area which just crosses the boundaries of individual rights as well as trade-union rights far beyond the contemplation of any——

Senator Watkins. Whatever your argument is, that is the order now, and, as I understand it, you refuse to do so on the ground you set forth. I want to make the record clear.

Mr. Flaxer. I haven't got them. I don't feel capable of producing them.

Senator Watkins. You said you could do it within a week.

Mr. Flaxer. No; that was not the question he asked. He asked could the list be compiled within a week and I said it could.

Mr. Arens. The information is available to you?

Mr. Flaxer. Yes.

Mr. Arens. *But you have declined to produce it; is that correct?*

Mr. Flaxer. *I haven't produced them.*

Mr. Arens. Will you produce it pursuant to the order of the chairman of this session within 10 days from today?

Mr. Flaxer. I will have to take that under consideration.

Senator Watkins. That is the order, and of course we will have to take whatever steps are necessary if at the end of the time you have not produced them.

[All emphasis supplied.]

EDGERTON, *Chief Judge*, with whom BAZELON, *Circuit Judge*, concurs, *dissenting:* On October 5, the date named in the subpoena, appellant appeared before Senator Watkins, the Chairman of the subcommittee. No other member was present. Appellant produced other records called for by the subpoena, but asked the Chairman to withdraw the demand for membership lists, explaining in effect that he considered the lists privileged. After some discussion the Chairman said: "You are directed

by the committee to produce those records according to the terms of the subpoena."

But the Chairman was immediately asked to reconsider this direction. The appellant said: "Again I plead with the chairman and with the committee to reconsider the entire matter, because I think you are infringing on a right that workers in America have, including Federal employees. . . ." The Chairman and the appellant proceeded to discuss the claim of privilege at some length. At the end of this discussion, which occupies a full page of the printed record, the Chairman said, ". . . I do not think any court would ever resolve itself against the United States finding out what organization its members belong to." Mr. Arens, committee counsel, said, "I respectfully suggest to the chairman that the witness be ordered to produce the information and transmit it to the subcommittee in 10 days' time." The Chairman immediately said to the appellant, "Since you have made the reply that it could be done in a week, that will be the order of the committee, that you submit that information as requested by counsel for the committee within 10 days from this date."

This seems to me a clear case of immediate reconsideration of an order followed by immediate substitution of a different order.

After some further discussion, the following colloquy occurred: "Mr. Arens. Will you produce it pursuant to the order of the chairman of this session within 10 days from today? Mr. Flaxer. I will have to take that under consideration. Senator Watkins. That is the order, and of course we will have to take whatever steps are necessary if at the end of the time you have not produced them." The appellant never produced the records.

The indictment did not charge him with failing to produce the records within 10 days from October 5. It charged that appellant "on October 5, 1951 . . . willfully failed and refused to produce the records . . . ." The

case was tried on that theory alone. This colloquy occurred: "The Court. I expect to tell them to determine it as of the 5th, and that if they find there was no refusal and willful default on that date, that they must find him not guilty even though they believe that he defaulted at some other time. Mr. Hitz [Government counsel]. That's right. I believe that is the law." The court charged the jury: "you are to determine whether on that date, October 5, 1951, the defendant appeared before a subcommittee and then willfully failed and refused to produce the documents and then willfully did make default. If you find that he did not willfully make default at that time and place—that is, on October 5, 1951—then your verdict would be not guilty, even though you may believe that at some other time that he did willfully default. In other words, the question before you is whether there was a willful default on October 5, 1951, when he appeared before the committee."

In *Quinn* v. *United States*, 349 U.S. 155, 165-166, the Court said: "Clearly not every refusal to answer a question propounded by a congressional committee subjects a witness to prosecution under §192. Thus if he raises an objection to a certain question—for example, lack of pertinency or the privilege against self-incrimination—the committee may sustain the objection and abandon the question, even though the objection might actually be without merit. In such an instance, the witness's refusal to answer is not contumacious, for there is lacking the requisite criminal intent. . . . In short, unless the witness is clearly apprised that the committee demands his answer notwithstanding his objections, there can be no conviction under §192 for refusal to answer that question." The present appellant was clearly apprised that notwithstanding his objections, the Chairman demanded that he produce the records *within 10 days from October 5*. He was not apprised that, notwithstanding his objections, he must produce the records on October 5.

On the contrary, the Chairman made it clear that he need not produce them on that date and production within 10 days from that date would suffice. It follows that here, as in the *Quinn* case, the District Court should have directed a judgment of acquittal.

The *Quinn* case—which the Supreme Court had not yet decided—requires reversal for another reason as well. Soon after the hearing before the Chairman began, the present appellant raised an objection to the subpoena. He said: "I produced all the items called for in the subpena except . . . the item on membership lists of our union. The demand for the production of this item raises a number of profoundly serious issues. . . . Every individual who joins a union joins it with the confidence and trust supported by tradition and law that the act of joining and maintaining membership is a personal right and freedom that is inviolate. . . . I am confident that the members of this committee, after considering my views and after a study of the full implications of the request made in this subpena, will realize its conflict with the basic union tradition of this country now incorporated into Federal law and withdraw the demand for membership lists." Appellant was entitled, and in effect asked, to have his objection to the subpoena considered by "this committee", i.e. the subcommittee. It was not so considered. Under Senate rules, the chairman was a quorum "for the purpose of administering oaths and taking sworn testimony", but he was not a quorum for other purposes. The appellant, as soon as he was sworn, objected to the absence of a quorum. In many cases, including this one, the right to a quorum is more than a technicality. A quorum might have accepted appellant's view that the subpoena was invalid. Even if it had not accepted that view, it might have concluded that numbers of union members, not their names, were all that the committee needed, and might therefore as a matter of policy have withdrawn the demand for names.

In my view it is unnecessary to consider appellant's contention that the demanded records, particularly as to non-federal employees, were not pertinent to the committee's authorized investigation.

FAHY, *Circuit Judge*, dissents on the ground that the Subcommittee had empowered a single member only to administer oaths and to take sworn testimony and this power was not broad enough to include authority in but one member to rule upon objections to the production of documents called for by a subpoena *duces tecum*.

[fol. 115] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

No. 462, October Term, 1956

No. 12,027

ABRAM FLAXER, Petitioner,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

This Cause came on to be heard on the transcript of the record from the United States Court of Appeals for the District of Columbia Circuit, and was duly submitted.

On Consideration Whereof, It is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals, in this case, be, and the same is hereby, vacated; and that this cause be, and the same is hereby, remanded to the United States Court of Appeals for the District of Columbia Circuit for consideration in light of Watkins v. United States, No. 261, October Term, 1956, decided June 17, 1957.

June 24, 1957

Mr. Justice Clark dissents for the reasons stated in his dissenting opinion in Watkins v. United States, supra.

Mr. Justice Burton took no part in the consideration or decision of this case.

A true copy John T. Fey, Test: Clerk of the Supreme Court of the United States, by /s/ R. J. Blanchard, Deputy.

July 22, 1957.

[fol. 116] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12027

ABRAM FLAXER, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

On Reargument of Appeal from the United States District Court for the District of Columbia Pursuant to Remand by the Supreme Court of the United States.

Decided April 3, 1958

Mr. David Rein, with whom Mr. Joseph Forer was on the brief, for appellant.

Mr. William Hitz, Assistant United States Attorney, with whom Mr. Oliver Gasch, United States Attorney, and Messrs. Lewis Carroll, John D. Lane and Harold D. Rhynedance, Jr., Assistant United States Attorneys, were on the brief, for appellee.

Before Edgerton, Chief Judge, and Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington and Danaher, Circuit Judges, sitting *en banc*. Circuit Judges Bastian and Burger took no part in the hearing or decision of this case.

OPINION—Decided April 3, 1958

PRETTYMAN, Circuit Judge: In 1956 we affirmed the conviction of Flaxer for contempt.[1] The Supreme Court va-

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[1] Flaxer v. United States, 98 U.S. App. D.C. 324, 235 F.2d 821.

[fol. 117] cated our judgment and remanded[2] "for consideration in the light of *Watkins* v. *United States*".[3]

In *Barenblatt*[4] upon similar remand we held that the Supreme Court in *Watkins* did not vitiate *in toto* the resolution of the House establishing the Un-American Activities Committee. We came to that conclusion for four reasons: (1) The Court did not say the resolution is invalid; (2) the Court discussed at length other points regarding pertinency, which discussion we deemed not to be *dictum*; (3) the Court cited and did not overrule a number of cases upholding convictions for contempt under the same resolution; and (4) the Court remanded the case to us for further consideration, a useless gesture if the resolution itself is invalid.

As we pointed out upon remand in *Sacher*[5] the Senate resolution here involved[6] is more precise than the House resolution criticized in *Watkins*. *A fortiori* this resolution was not struck down by the Court in its *Watkins* opinion.

We have, then, only the questions posed by *Watkins* as to pertinency. Even if the resolution is vague, Flaxer's responses to questions demonstrated that he knew what the subject of the inquiry was. In response to the *subpoena* he produced the financial and various other records of his union and, without objecting, presented them to the Committee on the record. He thus indicated that he recognized the nature of the question under inquiry. He refused to produce the membership lists but not upon the ground they [fol. 118] were not pertinent. He objected on the ground that the Government as an employer is not entitled to know which of its employees belong to unions; he made an extensive statement of his position on that point.

Flaxer now seizes upon the word "irrelevant", used by him in one answer, as support for his claim that he objected

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[2] Flaxer v. United States, 354 U.S. 929, 1 L.Ed. 2d 1533, 77 S.Ct. 1392 (1957).

[3] 354 U.S. 178, 1 L.Ed. 2d 1273, 77 S.Ct. 1173 (1957).

[4] Barenblatt v. United States, —— U.S. App. D.C. ——, —— F.2d —— (Jan. 16, 1958).

[5] Sacher v. United States, —— U.S. App. D.C. ——, —— F.2d —— (Jan. 31, 1958).

[6] S. Res. No. 366, 81st Cong., 2d Sess. (1950).

to the question upon pertinency grounds. The Chairman had pointed out that the Committee was in executive session and that the records would not be public upon presentation unless so ordered by the Committee. The whole of Flaxer's answer was: "Sir, on that I don't see any good purpose that these records would serve, even if I were to produce them. I think they are wholly irrelevant, if you say they are not to be made public." In using the word "irrelevant" Flaxer was merely expressing his view of a presentation in private. The only meaning reasonably inferrable from his answer is that if not made public the records were irrelevant.

We affirm the judgment of the District Court.

Affirmed.

WASHINGTON, Circuit Judge, concurs in the result, finding no impediment in *Watkins*, or other controlling authority, to affirmance of the conviction.

FAHY, Circuit Judge, with whom EDGERTON, Chief Judge, and BAZELON, Circuit Judge, concur, dissenting: When the case was here before, prior to the *Watkins* decision of the Supreme Court, I dissented on the ground that the Internal Security Subcommittee of the Senate Committtee (sic) on the Judiciary had empowered a subcommittee consisting of a single member to do no more than to administer oaths [fol. 119] and to take sworn testimony.[1] This, I thought, did not authorize the subcommittee consisting of the Chairman alone to rule upon appellant's objections to the produc-

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[1] Tr. 45-56. This action was in accordance with S. Res. 366, 81st Cong., 2d Sess., the resolution to which the Internal Security Subcommittee owes its authority. This resolution provides:

> A majority of the members of the [Judiciary] committee, or duly authorized subcommittee thereof, shall constitute a quorum for the transaction of business, except that a lesser number, to be fixed by the committee, or by such subcommittee, shall constitute a quorum for the purpose of administering oaths and taking sworn testimony.

96 Cong. Rec. 16872 (1950). See my dissent in *Sacher* v. *United States*, —— U.S. App. D.C. ——, —— F.2d ——; n. 1.

tion of documents called for by a subpoena *duces tecum* issued under authority of the parent Subcommittee. Contrary views prevailed in this court, after which the Supreme Court granted certiorari and remanded the case to us for reconsideration in the light of *Watkins*. 354 U.S. 929.

Under *Watkins* a delegation by Congress or by the Senate or the House of Representatives to an investigative committee must "spell out that group's jurisdiction and purpose with sufficient particularity. Those instructions are embodied in the authorizing resolution. That document is the committee's charter." 354 U.S. at 201. There the Court was considering the question of the committee's authorized scope of inquiry as it bore upon the pertinency of questions asked a witness. But the force of *Watkins* cannot be confined to issues of pertinency. *Watkins* requires as well clarity and certainty in the delegation of whatever power is sought to be exercised to compel obedience by a witness on pain of punishment for crime for not obeying. In that light *Watkins* fortifies the basis of my previous dissent. The charter here was the resolution of the parent Subcommittee delegating specified authority to a one-member [fol. 120] subcommittee. To repeat, this subcommittee, before whom appellant appeared, was given authority only to administer oaths and to take sworn testimony. Its charter is expressed only in those terms. The broader authority claimed is not to be implied. Moreover, the reason for the particular character of the limited delegation is known. It was to avoid the defense of no quorum, that is, of no competent tribunal, in event a witness were prosecuted for perjury for testimony given under oath before a single member. See *Christoffel* v. *United States*, 338 U.S. 84. This purpose was accomplished by constituting one member a quorum to administer oaths and to take sworn testimony.

Like considerations fortify the dissenting opinion of Chief Judge Edgerton, in which Judge Bazelon concurred, when the case was here before. The Chief Judge stated,

> Appellant was entitled, and in effect asked, to have his objection to the subpoena considered by "this committee", i.e., the subcommittee. It was not so considered. Under Senate rules, the chairman was a quorum "for the purpose of administering oaths and

taking sworn testimony", but he was not a quorum for other purposes.

98 U.S. App. D.C. 324, 334, 235 F.2d 821, 831. "Other purposes" would include consideration of and decision upon appellant's repeated requests that he be not required to produce the membership lists called for by the subpoena *duces tecum*.

For these reasons I think the judgment of conviction should be reversed and the appellant discharged.

EDGERTON, Chief Judge, and BAZELON, Circuit Judge: Besides joining fully with Judge Fahy, we think the conviction should be reversed for the additional reason stated in our former dissent. 98 U.S. App. D.C. 324, 333, 235 F.2d 821, 830.

[fol. 121] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Criminal 1756-52

No. 12,027

ABRAM FLAXER, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

On Reargument of Appeal from the United States District Court for the District of Columbia Pursuant to Remand by the Supreme Court of the United States.

Before: Edgerton, Chief Judge, and Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington and Danaher, Circuit Judges, sitting en banc.

JUDGMENT—Dated April 3, 1958

Pursuant to the judgment of the Supreme Court of the United States dated June 24, 1957, this case came on to be reheard before the Court en banc on the record from the United States District Court for the District of Columbia, and was reargued by counsel.

On Consideration Whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this case be, and it is hereby, affirmed.

Dated: April 3, 1958

Per Circuit Judge Prettyman.

Circuit Judge Washington concurs in the result.

Separate dissenting opinion by Circuit Judge Fahy, with whom Chief Judge Edgerton and Circuit Judge Bazelon concur.

Separate opinion by Chief Judge Edgerton and Circuit Judge Bazelon in support of reversal.

(Circuit Judges Bastian and Burger took no part in the hearing or decision of this case.)

[fol. 123] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 124]

SUPREME COURT OF THE UNITED STATES

No. 965, October Term, 1957

[Title omitted]

ORDER ALLOWING CERTIORARI—June 9, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted, and the case is assigned for argument immediately following No. 787.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Burton took no part in the consideration or decision of this application.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 60

ABRAM FLAXER, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No.

ABRAM FLAXER, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Abram Flaxer, prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit which affirmed a judgment of the United States District Court for the District of Columbia convicting petitioner of violating 2 U. S. Code, sec. 192, by refusing to produce records called for by a subpoena of the Senate Internal Security Subcommittee.

OPINIONS BELOW

The opinions issued in connection with the original decision below (R. 96-114) are reported at 98 App. D. C. 324, 235 F. 2d 821, and also appear in Appendix B of this petition. The opinions issued on the second

decision, following remand of the case by this Court for reconsideration, have not yet been reported. They appear at R. 116-120 and also in Appendix C of this petition.

JURISDICTION

The judgment below (R. 121; Appendix A, *infra*) was entered on April 3, 1958. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. Code, sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the conviction of a union president for contempt of Congress for refusing to produce to the Senate Internal Security Subcommittee the names and addresses of the 35,000 members of his labor union may be sustained, there being no evidence of the subject under inquiry, of the pertinency of the documents demanded, of the purpose for which the subcommittee desired the names, or of the use to which the names would be put, and no showing of a legislative purpose for the demand.

2. Whether it was permissible for the court below to find pertinency and a legislative purpose in the absence of evidence on the subject, by conjecturing that the Subcommittee desired the names of the Union's members in order to check them "against a list of subversives to determine the extent of infiltration into the union."

3. Whether the purpose conjectured by the court below is a valid legislative purpose and consistent with the Constitution.

4. Whether the authority of the Internal Security Subcommittee is so vague that it may not constitutionally support the use of compulsory process.

5. Whether the conviction was invalid because petitioner objected at the Subcommittee hearing that the demanded documents were irrelevant and served no legislative purpose, and yet the Subcommittee failed to state the subject under inquiry, the pertinency of the documents, or the legislative purpose.

6. Whether under the Senate rules and the Senate resolution establishing the Subcommittee, one member of the Subcommittee constituted a quorum for the purpose of ruling on objections to the validity of a subpoena duces tecum to produce the names and addresses of 35,000 members of a labor union.

7. Whether petitioner was guilty of a wilful default for the failure to produce the membership lists at a hearing at the conclusion of which he was directed to produce the documents not then and there, but within ten days.

STATUTES AND RESOLUTIONS INVOLVED

Rev. Stat., Sec. 102, as amended, 2 U.S.C., sec. 192:

> Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

S. Res. 366, 81st Cong., 2d Sess. (1950) (96 Cong. Rec. 16862) provides in part:

Resolved, That the Committee on the Judiciary, or any duly authorized subcommittee thereof is authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence.

SEC. 2. The committee, or any duly authorized subcommittee thereof, is authorized to sit and act at such places and times during the sessions, recesses, and adjourned periods of the Senate, to hold such hearings, to require by subpoenas or otherwise the attendance of such witnesses and the production of such books, papers, and documents, to administer such oaths, to take such testimony, to procure such printing and binding, and, within the amount appropriated therefor, to make such expenditures as it deems advisable. * * * Subpoenas shall be issued by the chairman of the committee or the subcommittee, and may be served by any person designated by such chairman.

A majority of the members of the committee, or duly authorized subcommittee thereof, shall constitute a quorum for the transaction of business, except that a lesser number, to be fixed by the committee, or by such subcommittee, shall con-

stitute a quorum for the purpose of administering oaths and taking sworn testimony.

Senate Resolution 180, 81st Cong., 2d Sess. (96 Cong. Rec. 1284) amended subsection (3) of Rule XXV of the Standing Rules of the Senate, to read as follows:

> 3(a) Except as provided in paragraph (b) of this subsection, each standing committee, and each subcommittee of any such committee, is authorized to fix the number of its members (but not less than one third of its entire membership) who shall constitute a quorum thereof for the transaction of such business as may be considered by said committee subject to the provisions of Section 133(d) of the Legislative Reorganization Act of 1946.
>
> (b) Each standing committee, and each subcommittee of any such committee, is authorized to fix a lesser number than one third of its entire membership who shall constitute a quorum thereof for the purpose of taking sworn testimony.

The new matter introduced by Resolution 180 is subparagraph (b). Unless changed, the rules of one session of the Senate carry over into the next (R. 35).

STATEMENT OF THE CASE

This case was previously before this Court as No. 462, October Term, 1956, on petition for certiorari to review an affirmance of petitioner's conviction by a four-three vote of the court below, sitting in banc (Chief Judge Edgerton and Circuit Judges Bazelon and Fahy dissenting). On June 24, 1957, the Court granted the petition for certiorari, vacated the judgment below, and remanded the case for consideration in the light of *Watkins* v. *United States*, 354 U.S. 178, decided June 17, 1957 (R. 115). See *Flaxer* v. *United*

States, 354 U.S. 929. On the remand, the court below, again sitting in banc, reaffirmed the conviction by a vote of four to three (Chief Judge Edgerton and Circuit Judges Bazelon and Fahy again dissenting).

The Subcommittee Proceedings

On September 19, 1951, petitioner, then national president of a labor union, the United Public Workers of America (R. 39), was served with a subpoena duces tecum of the Subcommittee on Internal Security of the Senate Committee on the Judiciary (R. 37, 64). The subpoena directed production on October 5, 1951 of records of the Union[1] showing (1) certain financial data, (2) the names and addresses of all Union members employed by the federal government, and (3) the names and addresses of all Union members employed by any state, county or municipal government. The subpoena gave no indication of the subject matter of the inquiry. (R. 63-4.)

The Union had approximately 35,000 members, and since these were all government employees, compliance with the subpoena would have required petitioner to produce, in addition to financial information, the names and addresses of the Union's entire membership. Five percent of the members were federal employees, most of whom worked for the Bureau of Engraving, the Post Office and the Veterans Administration. The rest of the Union's members were employees of state, county and municipal governments, mostly the last. (R. 43-4, 53.)

The subpoena had been prepared and apparently sent to Senator McCarran, then Subcommittee chair-

[1] Erroneously named in the subpoena as "United Professional Workers of America" (R. 63, 42).

man, by two members of the Subcommittee staff, who were acting, so far as appears, without advance authorization or approval of the Subcommittee (R. 53-61).

Petitioner appeared before the Subcommittee on October 5, 1951. Only one member of the Subcommittee, Senator Watkins, was present. At the outset of the hearing, petitioner objected to the absence of a quorum. Senator Watkins overruled his objection. (R. 38-9.)

At the hearing, petitioner produced, as demanded by the subpoena, Union records showing the amount, source and place of deposit of the Union's funds and the organizations to which the Union had contributed during the preceding twelve months (R. 39-41). Petitioner was asked various questions about the Union, all of which he answered, including questions on its methods of operation, the number of its members, and where the members were employed (R. 43-46).

The petitioner objected, however, to those portions of the subpoena which demanded the production of the names and addresses of the Union's members. He argued that these demands invaded "the rights of unions to the privacy of their membership records" and that experience taught that invasions of this privacy served "to compile blacklists for the sole purpose of destroying unions" (R. 41). He added (R. 42):

> "Every individual who joins a union joins it with the confidence and trust supported by tradition and law that the act of joining and maintaining membership is a personal right and freedom that is inviolate. A request such as the present constitutes a wholesale invasion of such privacy and

the 'right to be let alone' which is protected by the fourth amendment. Every trade-union member imposes a special trust in his union officers to protect and preserve that right. Therefore, to submit to the request in this subpoena would be a violation of the trust imposed in me by my membership and a betrayal of the entire trade-union movement in this country. I have no doubt that not a single union president would find it possible to comply with such a request.

"I am confident that the members of this committee, after considering my views and after a study of the full implications of the request made in this subpoena, will realize its conflict with the basic union tradition of this country now incorporated into Federal law and withdraw the demand for membership lists."

Petitioner said that he did not have the list of Union members with him because he considered the demand for the list to be improper. Senator Watkins then stated: "You are directed by the committee to produce those records according to the terms of the subpena." (R. 47.)

Petitioner immediately asked for reconsideration, urging that the subcommittee was violating a national policy, manifested in federal legislation, against an employer's asking the names of union members (R. 47-8). Senator Watkins replied: "I do not think there is any law or any court holding that the United States itself cannot find out the names of a union and the people who belong to it that are in its employ" (R. 48).

In reply to a question by Richard Arens, the Subcommittee's counsel, petitioner said that the informa-

tion called for could be compiled in a week (R. 49). The following then occurred (R. 49-50):

"Mr. Arens. I respectfully suggest to the chairman that the witness be ordered to produce the information and transmit it to the subcommittee in 10 days' time.

Senator Watkins. Since you have made the reply that it could be done in a week, that will be the order of the committee, that you submit that information as requested by counsel for the committee within 10 days from this date. . . .

Mr. Flaxer. I would like to suggest to the committee to reconsider that. I think you ought to consider it in light of the facts that organized labor in America will recognize in this a break in the wall that they have built up over half a century against the initiation of blacklists. I don't think that these lists can be looked upon in any other light than as blacklists.

* * * *

Senator Watkins. May I direct your attention to the fact that this is an executive session and the records are not public here unless the order of the committee is to make them public. But at least for the present the records are to be delivered to the committee in executive session.

Mr. Flaxer. Sir, on that I don't see any good purpose that these records would serve, even if I were to produce them. I think they are wholly irrelevant, if you say they are not to be made public.

Senator Watkins. I am not promising you they would not be made public, because I do not think the Government has to make such a promise to get the information.

Mr. Flaxer. I think, with all due respect to the committee, you are infringing here on an area which just crosses the boundaries of individual

rights as well as trade-union rights far beyond the contemplation of any—

Senator Watkins. Whatever your argument is, that is the order now . . .

* * * * *

Mr. Arens. The information is available to you?

Mr. Flaxer. Yes.

* * * *

Mr. Arens. Will you produce it pursuant to the order of the chairman of this session within 10 days from today?

Mr. Flaxer. I will have to take that under consideration.

Senator Watkins. That is the order, and of course we will have to take whatever steps are necessary if at the end of the time you have not produced them."

Petitioner did not supply the membership lists within the ten day period (R. 71).

At no time during the hearing did the Subcommittee state the subject of the inquiry, the purpose for which the subpoenaed membership lists was desired, or what use would or could be made of the lists by the Subcommittee.

The Court Proceedings

Petitioner was indicted on two counts. The first count charged that on October 5, 1951 (the date of the Subcommittee hearing) he had wilfully refused to produce the names and addresses of all Union members employed by the federal government. The second count charged that on the same date he had wilfully refused to produce the names and addresses of all Union members employed by any state, county or municipal government. (R. 2-3.)

At the trial, the government introduced the subpoena (R. 63-4), the transcript of the Subcommittee hearing (R. 38-50, 65-70), and testimony of Richard Arens, counsel for the Subcommittee (R. 32, 62). Arens testified that the Subcommittee had information that petitioner, the Union's secretary-treasurer, its former negotiations director, and "certain" members of its executive board were members of the Communist Party (R. 51-3). Neither Arens nor any other witness gave any testimony as to what was the subject under inquiry or the pertinency of the Union's membership list to any subject. Nor is there any evidence in the record of why the Subcommittee wished the names and addresses of the 35,000 union members or what use it intended to make of that information.

The trial court denied a motion for judgment of acquittal (R. 14-20). She instructed the jury as a matter of law that the Subcommittee was authorized to obtain from the petitioner the documents demanded by the subpoena, that the documents "were pertinent to the study and investigation that the subcommittee was making," and that "there was a quorum of the committee" (R. 89). She also instructed the jury, with the acquiescence of both parties (R. 79), that the question was whether there was a wilful default on October 5, 1951, when petitioner appeared before the Subcommittee, and that if he did not wilfully default at that time, the verdict should be not guilty even though the jury might believe that at some other time he did wilfully default (R. 91). Petitioner was convicted on both counts and sentenced to imprisonment for two months and a fine of $1,000.00 (R. 20-1).

The appeal was first heard below by a regular three-judge division of the Court of Appeals, composed of

Chief Judge Edgerton and Circuit Judges Miller and Fahy. Two members of this division, Chief Judge Edgerton and Judge Fahy, were eventually to vote to reverse the conviction. However, before the division had announced a decision, the Court of Appeals on its own motion ordered reargument before the court in banc. On June 21, 1956, the in banc court affirmed by a vote of four to three (R. 96-114).

As already shown, the Subcommittee had never stated, and no evidence had been introduced, of the subject of the inquiry or the pertinency of the documents demanded by the subpoena. The majority of the Court of Appeals, in an opinion by Circuit Judge Miller, held that the Subcommittee's inquiry was justified under the third clause of its enabling resolution, authorizing it to study and investigate the "extent, nature and effects of subversive activities in the United States . . . including but not limited to espionage, sabotage and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world communist movement or any other movement seeking to overthrow the Government of the United States by force or violence." It ruled that against the background of this provision and anti-Communist legislation "the pertinency of the membership list demanded by the subpoena is at once apparent... The names could be used to check against a list of subversives to determine the extent of infiltration into the union, a matter clearly pertinent under the Resolution, particularly since this is a Government employees' union, even though the names of state and local members are included." (Appendix B, *infra*, pp. 8-9.) The majority did not mention the fact that there was no evidence either that such a "list of sub-

versives" existed or that the Subcommittee desired the Union's membership list for checking against such a master list.

Chief Judge Edgerton and Judge Bazelon dissented on two grounds: (1) that petitioner had not been directed to produce the records on October 5, but on the contrary the Subcommittee chairman had made it clear that petitioner need not produce them till ten days later; and (2) under the Senate rules a single Senator did not constitute a quorum of the Subcommittee for the purpose of ruling on petitioner's objections to the subpoena. They stated that it was unnecessary to consider the contention that the demanded records were not pertinent. (Appendix B, *infra*, pp. 15-19.) Judge Fahy dissented on the no-quorum point, and made no reference to any other point in the case (Appendix B, *infra*, p. 19).

A similar division reaffirmed the conviction following the remand for consideration of the applicability of the *Watkins* case. The prevailing opinion, written by Judge Prettyman, joined by Judges Miller and Danaher, first held that this Court did not in *Watkins* "vitiate in toto the resolution of the House establishing the Un-American Activities Committee." It then stated:

> "As we pointed out upon remand in *Sacher*, the Senate resolution here involved is more precise than the House resolution criticized in *Watkins*. *A fortiori* this resolution was not struck down by the Court in its *Watkins* opinion." (Appendix C, *infra*, p. 2.)

This statement represented an unexplained shift in the court's theory of the Subcommittee's authority for the inquiry. The first decision, as we have seen, was

based upon the third clause of the Subcommittee's authorizing resolution, that authorizing it to investigate "subversive activities." The *Sacher* opinion, relied upon by Judge Prettyman's opinion, expressly withheld consideration of this phase of the Subcommittee's authority, and held the Subcommittee resolution valid solely with respect to the first two clauses of the authorizing resolution, those authorizing investigation of the administration of the Internal Security Act of 1950 and "other laws relating to espionage, sabotage, and the protection of the internal security."[2]

On the question of pertinency, Judge Prettyman's opinion did not state what it considered the subject matter of the inquiry or what the documents demanded were pertinent to. It did not refer to the original theory of Judge Miller's opinion that the documents were pertinent because they "could be used to check against a list of subversives." Instead, it held:

> "Even if the resolution is vague, Flaxer's responses to questions demonstrated that he knew what the subject of the inquiry was. In response to the *subpoena* he produced the financial and various other records of his union and, without objecting, presented them to the Committee on the record. He thus indicated that he recognized the nature of the question under inquiry." (Appendix C, *infra*, p. 2.)

Judge Prettyman's opinion also ruled that it made no difference that the relevancy or purpose of the documents had never been disclosed at the Subcommittee hearing, on the grounds that petitioner had not ob-

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[2] The *Sacher* decision (App. D. C., No. 13302, decided Jan. 31, 1958) has not yet been reported. It is the subject of a petition for certiorari in No. 828, Oct. Term, 1957.

jected at the hearing to lack of pertinency. The opinion stated on this score:

> "Flaxer now seizes upon the word 'irrelevant', used by him in one answer, as support for his claim that he objected to the question upon pertinency grounds. The Chairman had pointed out that the Committee was in executive session and that the record would not be public upon presentation unless so ordered by the Committee. The whole of Flaxer's answer was: 'Sir, on that I don't see any good purpose that these records would serve, even if I were to produce them. I think they are wholly irrelevant, if you say they are not to be made public.' In using the word 'irrelevant' Flaxer was merely expressing his view of a presentation in private. The only meaning reasonably inferrable from his answer is that if not made public the records were irrelevant." (Appendix C, *infra*, pp. 2-3)

The opinion did not mention that on two occasions before the answer quoted, petitioner had told the Subcommittee that he thought the records would be used as blacklists, and that the Subcommittee had never said anything to the contrary.

Judge Washington issued a separate opinion, which stated merely that he "concurs in the result, finding no impediment in *Watkins* or other controlling authority, to affirmance of the conviction" (Appendix C, *infra*, p. 3).

Judge Fahy, joined by Chief Judge Edgerton and Judge Bazelon, dissented on the grounds that *Watkins* fortified his previous views on the lack of a Subcommittee quorum, since *Watkins* required that a delegation to an investigative committee must "spell out that group's jurisdiction and purpose with sufficient par-

ticularity (Appendix C, *infra*, pp. 3-5). Chief Judge Edgerton and Judge Bazelon also stated that they thought that the conviction should be reversed for the additional reason stated in their former dissent—namely, the absence of a direction to produce on the day of the Subcommittee hearing (Appendix C, *infra*, p. 5).

Although the case had been remanded for consideration in the light of *Watkins*, the court below did not attempt the "arduous and delicate task" of making an "accommodation of the congressional need for particular information with the individual and personal interest in privacy" (*Watkins*, at 198). It never considered what need or purpose the Congress had for the information, and in fact the record fails to disclose what legislative need or purpose the production of the information was meant to serve.

REASONS FOR GRANTING THE WRIT

1. This case involves the most extreme assertion of the legislative inquiry power which has yet been made. In sustaining petitioner's conviction, the court below has discarded recognized constitutional limitations on the inquiry power.

Never before has a labor union officer been convicted for refusing to produce to a Congressional committee the membership lists of his union. Never before, so far as we have been able to ascertain, has a committee made such a sweeping demand. The Subcommittee's unprecedented subpoena, insisted upon by a single Senator, sought to invade the privacy of the 35,000 individuals who were members of the Union. These were to be stigmatized by being listed in the archives of a committee operating in the area of internal se-

curity, and would thereafter be subject to public defamation at some crucial point in their affairs.[3] As stated in *Watkins* v. *United States*, 354 U.S. 178, 197, "Those who are identified by witnesses and thereby placed in the same glare of publicity are equally subject to public stigma, scorn and obloquy." The Subcommittee's subpoena also infringed the hard-won tradition of the American labor movement that labor unions should not be required to divulge the names of their members.

This wholesale intrusion into private affairs was not supported by any showing of a legislative purpose or of pertinency to a matter under inquiry, although such a showing is a constitutional prerequisite to a conviction for obstructing a legislative investigation. *Watkins* v. *United States, supra; Quinn* v. *United States*, 349 U.S. 155, 161; *Sinclair* v. *United States*, 279 U.S. 263, 296-7; *Kilbourn* v. *Thompson*, 103 U.S. 168. As stated in *Watkins*, "There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the

[3] Jacob K. Javits, then Attorney General of New York, discovered on the eve of his nomination as a Republican candidate for the United States Senate, that he was being attacked as a security risk on the basis of testimony which had been received by this same Subcommittee. Senator Javits was eventually accorded the privilege of testifying before the Subcommittee in order to clear himself. See 1956 Cong. Quarterly Almanac, pp. 732-3; N. Y. Times, Sept. 4, 7 and 10, 1956. On April 4, 1957, E. Herbert Norman, Canadian Ambassador to Egypt, committed suicide following this Subcommittee's release of derogatory information it had received concerning him in closed hearings—Mr. Norman having been previously cleared of the accusations by his own government. The Canadian government sent a formal protest to this government, and the Department of State expressed its condolences and regrets. N. Y. Times, April 5, 11 and 13, 1957.

Congress. . . . No inquiry is an end in itself; it must be related to and in furtherance of a legitimate task of the Congress" (at 187). And, ". . . an investigation into individual affairs is invalid if unrelated to any legislative purpose" (at 198).

In *Watkins*, the Court set aside for lack of a legislative purpose an attempted invasion of the privacy of a few former members of the Communist Party, whom the witness had refused to name. The attempted invasion of privacy here makes that involved in *Watkins* pale into insignificance. Yet there is wholly absent here any showing of pertinency, legislative purposes or need. Neither at the Subcommittee hearing nor at the trial was there ever stated or shown the subject of the inquiry, the Subcommittee's purpose in demanding the membership list, or the use to which the list would be put. What is more, the Subcommittee chairman never negated the repeated assertions of the petitioner that the Union's membership list was to be used for blacklisting—clearly a nonlegislative purpose.

The court below originally held that the Subcommittee desired to match the names of the union members against a "list of subversives" in order to determine whether the Union had been infiltrated by "subversives." This holding was unsupported conjecture. Nothing of the sort was suggested by the Subcommittee or by the government's evidence. The only evidence which had any conceivable bearing on the subject of the inquiry was testimony that the Subcommittee had information that certain union officers were Communists. This fails to establish any legitimate purpose or use for the names of the 35,000 union members, nor does it support the court's remarkable supposition that the Subcommittee

has a master list of the "subversives" in the American population.

If a legislative purpose, no matter how fantastic, may be conjectured by the appellate court for any demand, no matter how extravagant, the principle that Congressional investigations must have a legislative purpose becomes merely a paper requirement. Yet this has now occurred for the jurisdiction in which most Congressional investigations are held and in a period when abuse of the inquiry power is most prevalent. See Barth, *Government by Investigation* (1955); Taylor, *Grand Inquest* (1955), especially c. IV; Chafee, *The Blessings of Liberty* (1956) p. 221; *United States* v. *Rumely*, 345 U.S. 41, 44; *Watkins* v. *United States, supra*, at 195.

Certiorari should be granted, therefore, so that this Court may determine whether the court below has eliminated the requirements of legislative purpose and pertinency to a defined subject under inquiry, thereby sanctioning an unlimited extension of the Congressional inquiry power.

2. If the court below could supply by conjecture a purpose for the Subcommittee's demand, a major question arises as to whether this was a valid legislative purpose.

By the lower court's reasoning, the Subcommittee has power to subpoena the names and addresses of the one and a half million members of the Teamsters Union, of the million members of the United Automobile Workers, and, for that matter, of almost any organization. For it can always be speculated that the Subcommittee desires to check the names of the organization's members against its master list of "sub-

versives." By the same reasoning, the Subcommittee could demand the names of all employees and subscribers to the *New York Times*, in view of its investigation in 1955 and 1956 of "security risks" on the staff of that newspaper.[4]

In this case, it is true, the Subcommittee had derogatory information about some of the organization's leaders. But if such a foundation is necessary, it is, under current conditions, child's play to supply it, particularly for a Subcommittee which can develop derogatory security information about a Republican Attorney General of New York, a Canadian ambassador to Egypt, and the New York Times.

The fact that the petitioner's Union was composed of government employees is of no consequence, since that factor was not relevant to the court's theory of pertinency (the Subcommittee, as we have shown, had no theory at all, or if it did, failed to disclose it). In any event, 95% of the members were employed by state, county and municipal governments, and, absent some showing of federal interest, were presumptively outside the scope of federal control or regulation. See *Newton* v. *Commissioners*, 100 U.S. 548, 549; *Kentucky* v. *Dennison*, 65 U.S. 66, 107; *Wilson* v. *North Carolina*, 169 U.S. 586, 594; *Florida* v. *United States*, 282 U.S. 194, 211-2.[5] If production of the membership lists

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[4] See N. Y. Times editorial, Jan. 5, 1956; 1956 Cong. Quarterly Almanac, p. 732; 1957 Annual Report of the Subcommittee, pp. 97, 100, 103-6; N. Y. Times, Jan. 5, 1956, Apr. 20, 1956; Wash. Post & Times-Herald, Jan. 5, 7 and 10, 1956, Apr. 24, 1956; *United States* v. *Peck*, 154 F. Supp. 603.

[5] Even if it be assumed that the Subcommittee was justified in demanding the names and addresses of the members of the Union who were federal employees, the conviction on both counts must be reversed unless the Subcommittee was also justified in demand-

of this Union can be compelled on the theory of the court below, then the membership lists of any union are subject to the same demand.

The importance of this case to the American labor movement as a whole is therefore apparent. This has been recognized in comments condemning the action against petitioner in editorials appearing in the May, 1952 issue of the *Catering Industry Employee,* official journal of the Hotel and Restaurant Employees and Bartenders Industrial Union, in the July 1952 issue of the *Carpenter,* official journal of the United Brotherhood of Carpenters and Joiners, and in a statement of policy issued by the Executive Board of United Packinghouse Workers of America, *The Road Ahead,* April 1953. These unions saw the issue in this case as follows:

> "The issue is this: do unions have the right, as the courts have repeatedly held, to hold their membership lists in privacy?
>
> "I think they do. I hope others will join me in speaking out in defense of that right before it is too late." (*Catering Industry Employee.*)
>
> "The right of privacy is something it took organized labor generations to achieve. It is something unions must maintain if the blacklist, labor spying and all the evils of fifty years ago are not to be brought back." (*Carpenter.*)
>
> "In his recent contempt conviction for refusing to turn his union membership lists over to a Con-

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ing the names and addresses of union members employed by state, county and municipal governments. Both demands were contained in one subpoena, and the petitioner cannot be found guilty of contempt for refusal to comply with the subpoena if any part of it was bad and called for matters not within the authority of the Subcommittee. *Bowman Dairy Co.* v. *United States,* 341 U.S. 214, 221; *United States* v. *Patterson,* 206 F. 2d 433.

gressional investigating committee Abram Flaxer of the United Public Workers was supporting a principle on which any trade union leader would face jail rather than betray his trust." (*Packinghouse Workers* statement.)

Whether a Congressional committee has power to demand the membership lists of unions, particularly without a showing of pertinency and legislative purpose, is surely an important constitutional question, involving not merely the scope of the inquiry power generally, but also the First, Fourth and Fifth Amendments. Serious constitutional questions are also raised by the holding below that a legislative committee has authority to compile a "list of subversives" and thereby to justify an insatiable demand for names to check against the list. Nothing in the Constitution sanctions such a compilation, and the First and Fifth Amendments and the bill of attainder clause prohibit it.

3. Although the Court remanded this case for consideration in the light of *Watkins*, it is apparent that the court below has trivialized *Watkins* and repudiated its principles.

(a) Following the remand, the court below may have dropped—at least it did not repeat—its conjecture that the subpoenaed documents were pertinent because the names of Union members could be checked against "a list of subversives." But dropping this conjectured, non-legislative purpose still did not supply the showing of pertinency and legislative purpose required by *Watkins*. Despite the emphasis placed by *Watkins* on the need to ascertain the subject under inquiry, the court below on the remand still did not state what subject was under inquiry at the hearing petitioner attended. Of course, this omission was impelled by the fact that the record contains no evi-

dence on the question. Judge Prettyman's opinion states that petitioner knew the subject under inquiry because he produced the financial records which had been subpoenaed. This has no semblance of logic. Petitioner produced the financial records because he had no objection to doing so, just as Watkins answered some of the Committee's questions. Acquiescing to some demands does not demonstrate recognition of the question under inquiry in connection with these or other demands, nor did petitioner's production of some records in any way reveal the subject under inquiry or the pertinency of withheld records.

(b) Since the question under inquiry was not, and could not be, defined, it inevitably followed that the court below was unable to discharge its responsibility, recognized by *Watkins*, of weighing the legislative need for the information demanded against the invasion of privacy. *Watkins* stated (at 198-9):

> "Accommodation of the congressional need for particular information with the individual and personal interest in privacy is an arduous and delicate task for any court. . . . *United States* v. *Rumely* makes it plain that the mere semblance of legislative purpose would not justify an inquiry in the face of the Bill of Rights. The critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness. We cannot simply assume, however, that every congressional investigation is justified by a public need that overbalances any private rights affected. To do so would be to abdicate the responsibility placed by the Constitution upon the judiciary to insure that the Congress does not unjustifiably encroach upon an individual's right to privacy nor abridge his liberty of speech, press, religion or assembly."

(c) *Watkins* held that the charter of the Committee on Un-American Activities is too vague to support compulsory process. The authority of the Internal Security Subcommittee is defined in three clauses, at least one of which—that relating to investigation of "subversive activities"—obviously suffers from the same vice and even the same indefinite terminology. (See *Watkins* at 202, 214; *United States* v. *Peck*, 154 F. Supp. 603.) Since the subject matter of the inquiry and the pertinency and purpose of the documents were never established, it is impossible to tell which of the authorizing clauses is applicable to the subpoena that was issued in this case. Hence petitioner's conviction should have been set aside on the ground that the subpoena may have been, and in all likelihood was, issued under an invalid authorization.

The court below met this problem in two ways, neither of which was sound. First, it refused to recognize that *Watkins* prohibits criminal enforcement of a subpoena issued under a vague authorizing resolution. Second, it switched its theory of the case so as to hold the subpoena sustainable under the first two clauses of the Subcommittee's charter, whereas it had previously relied on the third clause, of whose vulnerability it had not then been aware. Of course, this fluid transition from one source of authority to another simply furnishes another demonstration that the Subcommittee's demands had no defined legislative purpose.

(d) *Watkins* held as a requirement of due process that a witness before a committee "is entitled to have knowledge of the subject to which the interrogation is deemed pertinent" (at 208-9), and that, "Unless the subject matter has been made to appear with indisputable clarity, it is the duty of the investigative body,

upon objection of the witness on grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto" (at 214-5).

Even this elementary protection has been eliminated by the court below. The petitioner on two occasions stated his belief that the Union membership lists were being demanded for the purpose of compiling a blacklist to destroy the Union (R. 41, 49). He also stated that the demand was "an improper command" (R. 47). Blacklisting is not a proper legislative function or committee subject, since "there is no congressional power to expose for the sake of exposure" (*Watkins* at 200), "nor is the Congress a law enforcement or trial agency" (*Watkins* at 187). Hence, petitioner's statements about blacklisting and the "improper command" were obviously objections that the Subcommittee's demands were not germane to any legitimate Congressional purpose. The one-man chairman of the Subcommittee did not contradict the petitioner's assertions, nor did he state the subject of the inquiry or the pertinency of the records. Instead, he merely called attention to the fact that "for the present the records are to be delivered to the committee in executive session" (R. 49). Petitioner responded: "Sir, on that I don't see any good purpose that these records would serve, even if I were to produce them. I think they are wholly irrelevant, if you say they are not to be made public" (R. 50). Thus petitioner's position was clear: If the records were to be made public, they would be used for an improper and impertinent purpose—blacklisting. If they were to be kept private, they would be "wholly irrelevant" even to the illegitimate purpose of blacklisting. Under any circumstances, the records could serve no valid purpose.

Petitioner, therefore, did challenge the pertinency and legislative purpose of the Subcommittee's demand. Since the Subcommittee did not then state the subject under inquiry and the manner in which the documents were pertinent thereto, *Watkins* requires that the conviction be reversed. Judge Prettyman's opinion on this point is simply blind to the facts of record. The opinion recognizes that petitioner objected that the documents would be irrelevant if they were not made public, from which it concludes that the petitioner's objection was to the documents being kept private! It fails to perceive that petitioner, by objecting that the Subcommittee wished to promulgate a public blacklist, was thereby objecting on grounds of lack of pertinency and legislative purpose if the lists were published. And it attaches no significance at all to petitioner's unequivocal statement that he did not see "any good purpose that these records would serve" if he were to produce them.

It is apparent that the court below is out of step with *Watkins*. Certiorari should be granted to correct this condition.

4. This case also involves an important question, never decided by this Court, as to what constitutes a quorum of a Senate committee for the purpose of ruling on objections to a subpoena duces tecum.

Under the Senate Rules and the Resolution which is the charter of the Subcommittee, at least one-third of the membership of a committee or subcommittee is necessary to constitute a quorum for the "transaction of business," except that a lesser number may be fixed by the committee or subcommittee "for the purpose of taking sworn testimony." See *supra*, pp. 4-5. The lesser number fixed by the Subcommittee here involved

is one Senator (R. 34). The question here is whether the smaller quorum authorized only to take sworn testimony is authorized to rule on objections to a subpoena duces tecum.

In the present case, a single Senator presided at the Subcommittee hearing at which petitioner appeared. He overruled petitioner's objection to the absence of a quorum, and, without consultation with any other members of the Subcommittee, overruled his objections to the production of the 35,000 names and addresses of members of his union.[6]

Three of the seven judges of the court below agreed that a full quorum was necessary to rule on petitioner's objections, and that therefore petitioner was not guilty of contempt, his objections not having been validly overruled, as required by *Quinn* v. *United States*, 349 U.S. 155.

The Senate Rule, if read literally, sustains the dissents and petitioner's contention, since the authority of the smaller quorum is limited to the taking of sworn testimony.[7] Furthermore, the legislative history supports a strict construction of the authority of a smaller quorum. The provision for a smaller quorum, made by an amendment to Rule XXV (Sen. Res. 180, 81st Cong., 2d Sess., *supra*, p. 5), was designed to meet the

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[6] The contents of the subpoena had not been considered by a full quorum of the subcommittee prior to its issuance, see *supra*, pp. 6-7.

[7] Thus Black's *Law Dictionary* (3rd ed., 1933) defines "testimony" as: "Evidence given by a competent witness, under oath or affirmation; as distinguished from evidence derived from writings, and other sources." To like effect: Ballentine, *Law Dictionary* (3d ed., 1948); Bouvier's *Law Dictionary* (Rawle's 3rd Rev., 1914).

specific situation created by *Christoffel* v. *United States,* 338 U.S. 84, and its sole purpose was to eliminate a defense of no-quorum to a perjury charge. It was not intended otherwise to enlarge the authority of the smaller quorum. The Report on the Resolution which provided for the smaller quorum stated (Sen. Rep. 1208, 81st Cong., 2d Sess., p. 1):

> "Adoption of Senate Resolution 180 is intended to meet the problems raised by the Supreme Court's decision [in *Christoffel* v. *United States, supra*] by authorizing each Senate committee and subcommittee hereafter to fix the number of its members which shall constitute a quorum for the purpose of taking sworn testimony. The resolution does not otherwise change the existing requirements pertaining to committee quorums contained in the Senate Rules or in the Legislative Reorganization Act of 1946."

Senator Hayden, who managed the Resolution on the Senate floor for the Committee on Rules and Administration, advised the Senate (96 Cong. Rec. 1284):

> "Mr. President, this resolution is designed to take care of the question of a quorum being present in committees when sworn testimony is to be taken and perjury may be committed. It is to prevent perjury."

Later, Senator Hayden stated (*ibid*): "The resolution merely has to do with the procedure before committees in order to cover the question of perjured testimony."

Standard rules of construction also require that the provision for a smaller quorum, being stated as an exception to a general rule, be construed strictly, so as to avoid having the exception nullify the rule. *Schlem-*

mer v. *Buffalo R. & P.R. Co.*, 205 U.S. 1, 10; *Piedmont & Northern Ry. Co.* v. *I.C.C.*, 286 U.S. 299, 311-2; *United States* v. *Dickson*, 1 Pet. 141, 165; *United States* v. *Scharton*, 286 U.S. 518, 521-2.

And as Judge Fahy's opinion after the remand points out, *Watkins* supports the principle that clarity and certainty are essential to the delegation of power to one-man subcommittees.

The treatment of the quorum point by the majority below was cavalier. The original majority opinion ignored the legislative history and purpose of the Senate quorum rule and merely quoted an inapposite passage from Wigmore. Following the remand, the affirming judges did not even consider the applicability of *Watkins* to this subject.

Many of the abuses of the investigative power have been laid to the use of one-man subcommittees. See Barth, *op. cit. supra*, pp. 203-4. The decision below extends to such one-man subcommittees, contrary to the Senate Rules, the power to insist on the production of records and documents, no matter how serious are the policy questions involved. Here a single Senator insisted on a demand which had never before been made by a body of the Congress and which affected 35,000 individuals. As Chief Judge Edgerton pointed out in his dissent, a full quorum "might have accepted appellant's view that the subpoena was invalid. Even if it had not accepted that view, it might have concluded that numbers of union members, not their names, were all that the committee needed, and might therefore as a matter of policy have withdrawn the demand for names" (Appendix B, *infra*, p. 18).

Certiorari should be granted to determine whether such sweeping authority has actually been committed to one-man subcommittees.

5. This case involves an important question on the applicability of the doctrine of *Quinn* v. *United States*, 349 U.S. 155, as to the necessity of a direction. The petitioner, after objecting to the validity of the subpoena, was directed by the sole Senator present to produce the list of names and addresses of union members. He continued to object, asking for reconsideration of this ruling, and as a result was ordered to produce the documents not on that date, but ten days later. The majority below held that he was guilty of contempt on October 5th, the date of the hearing,[8] thus making irrelevant Senator Watkins' extension of the subpoena date for production. Judges Edgerton and Bazelon held that under *Quinn* it was necessary to examine the entire proceedings, and that the issue of direction must be resolved on the basis of the final ruling made on petitioner's objections, and not on the basis of an intermediate ruling.

The minority view is clearly the only tenable one under the *Quinn* doctrine. A witness is not "clearly apprised that the committee demands his answer notwithstanding his objections" (*Quinn* at 166), on the basis of a direction made in the course of a colloquy which is altered at the end of further discussion. A witness can only reasonably conclude that he should

[8] The majority agreed with the petitioner's contention that under the indictment and under the case as tried (see *supra*, p. 11), petitioner was either guilty of contempt on October 5th or not at all, and that the issue of the production or non-production of the list of names after October 5th was not in the case. (Appendix B, *infra*, pp. 3-7.)

be guided by the last words of the committee and not by its earlier statements. Indeed, this Court in *Quinn* (at 166, ftn. 34) cited with approval the decision and opinion of the District Court in *United States* v. *Kamp*, 102 F. Supp. 757, in which the defendant was acquitted of contempt on the basis of a colloquy between the defendant and the committee substantially identical to that which occurred here.

CONCLUSION

This case involves important questions which have been decided by a four to three vote in a manner inconsistent with the Constitution and principles established by decisions of this Court. Certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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APPENDIX A—THE JUDGMENT BELOW

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

January Term, 1958

Criminal 1756-52

Filed Apr. 3, 1958

No. 12,027

ABRAM FLAXER, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

On Reargument of Appeal from the United States District Court for the District of Columbia Pursuant to Remand by the Supreme Court of the United States.

Before: Edgerton, Chief Judge, and Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington and Danaher, Circuit Judges, sitting en banc.

Judgment

Pursuant to the judgment of the Supreme Court of the United States dated June 24, 1957, this case came on to be reheard before the Court en banc on the record from the United States District Court for the District of Columbia, and was reargued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this case be, and it is hereby, affirmed.

Dated: Apr. 3, 1958

Per Circuit JUDGE PRETTYMAN

Circuit Judge Washington concurs in the result.

Separate dissenting opinion by Circuit Judge Fahy, with whom Chief Judge Edgerton and Circuit Judge Bazelon concur.

Separate opinion by Chief Judge Edgerton and Circuit Judge Bazelon in support of reversal.

(Circuit Judges Bastian and Burger took no part in the hearing or decision of this case.)

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,027

ABRAM FLAXER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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Decided June 21, 1956

Mr. David Rein, with whom *Mr. Joseph Forer* was on the brief, for appellant.

Mr. John D. Lane, Assistant United States Attorney, with whom *Messrs. Leo A. Rover*, United States Attorney at time of argument, and *Lewis Carroll* and *William Hitz*, Assistant United States Attorneys, were on the brief, for appellee.

Before EDGERTON, Chief Judge, and PRETTYMAN, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON and DANAHER, Circuit Judges, sitting *en banc*. (Circuit Judges BASTIAN and BURGER took no part in the consideration or decision of this case.)

WILBUR K. MILLER, *Circuit Judge:* Indicted under 2 U. S. C. § 192[1] for willfully failing and refusing to pro-

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[1] The statute is as follows:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter

duce at a Senatorial subcommittee hearing on October 5, 1951, certain records required of him by a subpoena *duces tecum* and found guilty by a jury, Abram Flaxer appeals.

The appellant was president of the United Public Workers, a union made up of employees of Federal, state and local governments. In 1951 the Subcommittee on Internal Security of the Senate Committee on the Judiciary received information indicating that he and the other national officer of the union and certain of its directors were members of the Communist Party. Since the organization was therefore apparently dominated at the top by communists, the subcommittee decided to conduct an investigation as to whether its membership was infiltrated by them. To that end, a subpoena *duces tecum* was directed to Flaxer, commanding him to appear before the subcommittee on October 5, 1951, and to bring with him, *inter alia*, a list of the union's members showing which were employed by the Federal Government and which by other governmental units.

The subpoena was served on Flaxer September 19, some two weeks before the date of the hearing. He appeared before the subcommittee on October 5 but did not bring with him the classified membership list, which he said he could have compiled in a week's time. Instead, he read to the subcommittee a previously prepared written statement setting forth his reasons for not obeying the subpoena in that respect, after which Senator Wat-

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under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

kins (who constituted the subcommittee) directed him nevertheless immediately to produce the required records. He did not do so, and obviously he could not then have produced the list, even had he been disposed to obey after his objections had been overruled, because he had disabled himself by not preparing it in advance. Then, since it was physically impossible for Flaxer to file on that day the list he had not assembled and which it would take him a week to prepare, the Senator ordered him to submit it within ten days. Flaxer responded that he would "have to take that under consideration." He did not submit the membership list to the subcommittee within ten days thereafter, and has never submitted it.

Following the hearing on October 5, the subcommittee filed Report No. 1336 as to Flaxer's contempt in refusing to answer certain questions and in failing and refusing to obey the subpoena *duces tecum*. The Senate adopted a resolution that the Report be certified "under the seal of the United States Senate, to the United States Attorney for the District of Columbia to the end that said Abram Flaxer may be proceeded against in the manner and form provided by law." Senate Resolution 295, 82d Cong., 2d Sess., adopted March 19, 1952.

Thereafter Flaxer was indicted for violating the Code provision to which we have referred by willfully failing and refusing to produce on October 5, 1951, the membership list called for by the subpoena. At his trial, the counsel who had interrogated him on this subject at the hearing was the only witness. Testifying for the Government, he read into the record the portion of the transcript of the appellant's testimony before the subcommittee which had to do with Flaxer's non-compliance with the subpoena *duces tecum*. The appellant did not testify in his own behalf. In charging the jury the trial judge submitted the question whether, *on October 5, 1951*, Flaxer willfully failed and refused to produce the records required by the subpoena. The verdict was that he com-

mitted the offense on that day as charged in the indictment.

As a reason for reversal the appellant says he was not *ordered* on October 5 to produce the records at the hearing then being conducted and that therefore under the *Quinn* and *Bart* cases[3] he could not be found guilty of a willful disregard of the subpoena, and was entitled to a judgment of acquittal. With respect to this the appellant says in his brief:

> Accordingly, the issue before the trial court was whether the appellant was guilty of contempt of the command contained in the subpoena by virtue of his conduct at the October 5 hearing. Manifestly, he was not. Under the doctrine of the *Quinn* and *Bart* cases, *supra*, the appellant could not be found guilty of a wilful default of the subpoena unless, after consideration of his objections to the validity of the subpoena, he was directed to produce the records. But he was not so directed. On the contrary, he was told that he need not produce the records then and there but should produce them within ten days. The appellant replied that he would take that order under consideration. In effect, the order contained in the subpoena was vacated, and a new order substituted. The issue of appellant's compliance with this new order is not involved, since the appellant was neither indicted nor tried for a failure to carry out that order. Since there was no direction to produce the records at the hearing, there was consequently no wilful default of the command contained in the subpoena.

The record not only does not support the purportedly factual statements in the above quotation from appellant's brief, but is directly to the contrary. After consideration of his objections to the validity of the subpoena, Flaxer was unmistakably directed to produce the membership list. He was not told he need not produce

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[3] Bart v. United States, 349 U. S. 219 (1955); Quinn v. United States, 349 U. S. 155 (1955).

the list then and there; the record will be searched in vain for even an intimation to that effect. When Flaxer had completed a lengthy statement of his objections, the following occurred at the hearing:

> Mr. Arens [counsel for the subcommittee]. But you do have the information?
>
> Mr. Flaxer. In a general sense, I think I have the information.
>
> Mr. Arens. And you have not complied with the command of the subpena to produce that information.
>
> Mr. Flaxer. I think it is an improper command, sir.
>
> Senator Watkins. That is the reason you have refused to bring them here today, because you think it is improper?
>
> Mr. Flaxer. That is the reason I haven't got them.
>
> Senator Watkins. That is the main reason. You are directed by the committee to produce those records *according to the terms of the subpena.* [Our emphasis.][3]

The Senator could hardly have more clearly directed Flaxer, notwithstanding his objections, to produce the records on October 5. The direction was given in conscious compliance with the requirement of the *Quinn* and *Bart* cases, as Senator Watkins knew that Flaxer was unable to obey then and there because he had deliberately failed to prepare himself to do so. In fact, the witness had already said, "I have no such list with me." We conclude that, since there was an express direction to submit the membership list given after Flaxer's objections had been considered, he could be convicted of violating § 192.

The question is then whether the proof justified the jury's verdict that the appellant was in willful default on October 5. That his contumacy was complete on that day is clearly shown by his own testimony before the subcommittee. He testified he did not bring with him the membership records as the subpoena had commanded.

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[3] Official Reporter's Transcript, page 123.

Did he willfully fail to bring them, as the jury concluded? His own words and conduct answer the question in the affirmative. He could have compiled the membership list prior to the hearing, so that he might be ready to obey the subpoena should the subcommittee reject his objections and direct him to produce the records. He deliberately refrained from making the compilation, from which it is apparent that he had decided in advance he would not obey in any circumstances. He stated at the hearing that he regarded "as an improper command" the subpoena's direction that he bring the records. "That is the reason I haven't got them," he said. This was deliberate and defiant contempt of the United States Senate on October 5, 1951.

It was not until after the appellant had been directed, despite his protest, to produce the records according to the terms of the subpoena, that the chairman ordered him to assemble the information and transmit it to the subcommittee in ten days. Obviously this was because the subcommittee still wanted the information which had been contemptuously withheld from it at the hearing. But the chairman nowhere receded from his earlier ruling that the subpoena was to be complied with, which ruling was given after the witness had said he did not have the records with him. Senator Watkins said nothing which can be construed as excusing or condoning Flaxer's contempt — already complete — in disobeying the subpoena.[4]

If Flaxer had demonstrated good faith by compiling the membership records and sending them to the subcommittee within ten days, perhaps he would not have been indicted for his initial contempt. On that supposi-

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[4] In order to show the sequence of events and what actually happened at the hearing, we reproduce in an appendix to this opinion pertinent portions of Flaxer's testimony before the subcommittee regarding his failure and refusal to obey the subpoena with respect to the membership list.

tion some may think Senator Watkins—although he did not promise immunity in that event—was affording Flaxer an opportunity to purge himself of contempt. If so, it was an opportunity the appellant did not embrace. He remained recalcitrant, thus affirming and emphasizing the contempt he had originally displayed. That he may have committed another contempt in addition to that of October 5 would seem to be irrelevant.

We next consider the appellant's contention that he was entitled to a judgment of acquittal on his theory that a quorum of the subcommittee did not rule upon his objections to the validity of the subpoena. Senate Resolution 366,[5] which established the subcommittee, authorized it to provide that less than a majority should constitute a quorum "for the purpose of administering oaths and taking sworn testimony," and the subcommittee had decided that one member should constitute a quorum for that purpose. Flaxer argues that the authority to administer oaths and take sworn testimony does not include the authority to rule upon the validity of a subpoena.

The power to receive sworn testimony of course includes authority to rule on objections to questions asked the witness. Receiving documents is obviously a normal ancillary to taking testimony. Professor Wigmore says:[6]

> This testimonial duty to attend and disclose all that is needed for the ascertainment of truth applies to *every form and material of evidence* whatever.
>
> In particular it applies to such evidential material as exists in a person's hands in the form of *documents*. "There is no difference in principle," said a great judge [Shaw, C. J., in Bull v. Loveland, 10 Pick. 9, 14 (1830)], "between compelling a witness to produce a document in his possession, under a subpoena 'duces tecum' (in a case where the party calling the witness has a right to the use of such

[5] 81st Cong., 2d Sess. (1950).

[6] 8 WIGMORE, EVIDENCE § 2193 (3d ed. 1940).

> document), and compelling him to give testimony when the facts lie in his own knowledge." This much is unquestionable; for to give up facts possessed by physical control is no different from the giving up of data possessed as mental impressions.

We think authority to receive sworn testimony includes not only authority to rule on objections to questions but on objections to a subpoena *duces tecum* as well.

In considering appellant's further argument that the pertinency of the membership list called for by the subpoena was not established, it is essential first to ascertain what the subcommittee had been authorized and directed to do, and what it was doing or attempting to do in the hearing of October 5.

The Senate in 1950 authorized and directed its Committee on the Judiciary, or any duly authorized subcommittee, to study and investigate, among other things, the

> . . . extent, nature and effects of subversive activities in the United States . . . including but not limited to espionage, sabotage and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world communist movement or any other movement seeking to overthrow the Government of the United States by force or violence . . ..

The Committee was also directed to study the operation of the Internal Security Act of 1950 and other laws dealing with internal security.[7] In accordance with this authorization and direction there was created, in January, 1951, the Subcommittee on Internal Security.

In § 2 of the Subversive Activities Control Act of 1950[8] Congress graphically appraised the activities and

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[7] S. RES. 366, 81st Cong., 2d Sess. (1950), S. RES. 198, 82d Cong., 1st Sess. (1951) (continuing S. RES. 366).

[8] Title I of the Internal Security Act of 1950, 64 STAT. 987, 50 U. S. C. § 781.

purposes of the world communist "movement" and concluded that our form of government is in clear and present danger therefrom.[9] It was because of Congressional alarm reflected in that Act and other recent legislation that the subcommittee was authorized to study and investigate the extent, nature and effects of subversive activities, including the infiltration of labor organizations by persons who are or may be under communist domination. Against such a background, the pertinency of the membership list demanded by the subpoena is at once apparent. Cf. *Barsky* v. *United States,* 83 U. S. App. D. C. 127, 132, 167 F. (2d) 241, 246, *cert. denied* 334 U. S. 843 (1948); *Marshall* v. *United States,* 85 U. S. App. D. C. 184, 176 F. (2d) 473 (1949), *cert. denied* 339 U. S. 933 (1950). The names could be used to check against a list of subversives to determine the extent of infiltration into the union, a matter clearly pertinent under the Resolution, particularly since this is a Government employees' union even though the names of state and local members are included. Regardless of where they were employed, the names of members were pertinent because an investigation of the union was pertinent.

As a final reason for reversal, appellant points out that the indictment charged him with refusing to produce certain records of the United Public Workers of America; that the subpoena served on him in fact called upon him to produce the records of the United Professional Workers of America. This variance, says Flaxer, between the allegation in the indictment and the subpoena actually served on him was in itself fatal to the prosecution and required a judgment of acquittal. The point is frivolous, since Flaxer himself called attention to the inadvertent

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[9] This was held to dispense with the need for proof—in a deportation case where the question was pertinent—that the Communist Party advocates the violent overthrow of the Government. Galvan v. Press, 347 U. S. 522, 529-530 (1954).

use of the word "Professional" for the word "Public" in naming the union in the subpoena. He said, "I want to make a minor correction there. Our union is the United Public Workers. . . . Your subpena stated 'Professional Workers.' I recognized it was an error in your identification."

We hold that Flaxer was fairly tried and that his guilt was clearly shown. The judgment pursuant to the verdict must stand.

Affirmed.

APPENDIX

Official Reporter's Transcript, pages 113-116:

Mr. Flaxer. . . . The item which I have not produced is the item on membership lists of our union. The demand for the production of this item raises a number of profoundly serious issues. From the very beginning of the union movement in this country, the rights of unions to privacy of their membership records—

Mr. Arens. You are reading from a prepared statement?

Mr. Flaxer. Yes.

Mr. Arens. Who prepared the statement?

Mr. Flaxer. I did. (Continues:) Has been one of the basic precepts to which the labor movement of America has adhered. Bitter experience has taught American labor that the right to join a union is an empty right unless the fact of membership can be kept private.

Throughout our history, employers and antilabor groups have attempted to violate the secrecy of union records in order to compile blacklists for the sole purpose of destroying unions. This has been amply documented in the hearings of the La Follette committee. After bitter struggles in and out of the Halls of Congress, labor has succeeded in enacting into law this right of privacy. Countless decisions of the

National Labor Relations Board and of our Federal courts have upheld that right. Indeed, the mere query by an employer of an employee as to his union membership has been held to be an unfair labor practice even under the Taft-Hartley Act.

Every individual who joins a union joins it with the confidence and trust supported by tradition and law that the act of joining and maintaining membership is a personal right and freedom that is inviolate. A request such as the present [one] constitutes a wholesale invasion of such privacy and "the right to be let alone" which is protected by the fourth amendment. Every trade-union member imposes a special trust in his union officers to protect and preserve that right. Therefore, to submit to the request in this subpena would be a violation of the trust imposed in me by my membership and a betrayal of the entire tradition of the trade-union movement in this country. I have no doubt that not a single union president would find it possible to comply with such a request.

I am confident that the members of this committee, after considering my views and after a study of the full implications of the request made in this subpena, will realize its conflict with the basic union tradition of this country now incorporated into Federal law and withdraw the demand for membership lists.

Mr. Arens. Do you have such a list?

Mr. Flaxer. I have no such list with me.

Mr. Arens. Do the records of the United Professional Workers reflect such a list? Is the information available, in other words?

Mr. Flaxer. I want to make a minor correction there. Our union is the United Public Workers.

Mr. Arens. I meant the United Public Workers.

Mr. Flaxer. Your subpena stated "Professional Workers." I recognized it was an error in your identification.

Mr. Arens. Did the United Public Workers' organization have the information available which is called for in the subpena?

Mr. Flaxer. Well, we generally have such information.

* * * * *

Official Reporter's Transcript, pages 122-128:

Mr. Arens. Mr. Chairman, I respectfully ask of the chairman that the witness be ordered to produce for this record, in compliance with the subpena duces tecum served upon him, the record[s] of the United Public Workers who are employed by the Federal Government of the United States of America, and records showing the names and addresses of all members who are employed by any State, county, or municipal government located anywhere in the United States of America.

Senator Watkins. Do you understand the request made of you?

Mr. Flaxer. Yes; I do.

Senator Watkins. Do you stand on your statement that you refuse to produce those?

Mr. Flaxer. I didn't say I refused. I indicated the situation is such that I find myself incapable of producing them. I think if I complied with a request of that kind, first of all I don't think I have the right either in terms of our membership or in terms of the labor movement generally—

Mr. Arens. But you do have the information?

Mr. Flaxer. In a general sense, I think I have the information.

Mr. Arens. And you have not complied with the command of the subpena to produce that information.

Mr. Flaxer. *I think it is an improper command, sir.*

Senator Watkins. That is the reason you have refused to bring them here today, because you think it is improper?

Mr. Flaxer. *That is the reason I haven't got them.*

Senator Watkins. That is the main reason. *You are directed by the committee to produce those records according to the terms of the subpena.*

Mr. Flaxer. Again I plead with the chairman and with the committee to reconsider the entire matter, because I think you are infringing on a right that workers in America have, including Federal employees. You are the Government. You are the employer. You are as an employer asking for mem-

bership lists. You want your own employees to identify themselves as to their trade-union membership. This is something that has not been done in America for the past 10 or 15 years, and where it has been done, it has been condemned as an unfair labor practice. And I just don't believe, sir——

Senator Watkins. As I understand it, you do not claim any rights under the Taft-Hartley Act, because you have not complied with it, and the Government itself, I think, would be entitled to know of its employees whether or not they are members of a union.

Mr. Flaxer. Then I think they ought to ask the employees. I don't think they are entitled to know, sir. I don't think so. I think the Government as an employer ought to adhere to the general national policy on this question. The general national policy on this question is that an employer has no right to ask a union member whether he belongs to an organization even if he tells that union membership that he doesn't even have to tell him [*sic*]. There are cases on record, upheld by the Federal courts of the United States, where the employer is enjoined from asking a person whether he belongs to a union, even though there is no punishment attached to it.

Senator Watkins. I would not argue with you for employees outside of the Government service, or State, county and municipal service. I am not going to argue that question because it is not at issue here. But we have here now an organization made up of people who are working for Government and we are asking you specifically for the names of those who are working for Government. You have that within your information and I do not think there is any law or any court holding that the United States itself cannot find out the names of a union and the people who belong to it that are in its employ.

Mr. Flaxer. Sir, I don't think the issue has ever come up before.

Senator Watkins. Maybe it has not, but I do not think any court would ever resolve itself against the United States finding out what organization its members belong to.

Mr. Arens. How long would it take you, Mr.

Flaxer, to prepare the information which is called for in this subpena?

Mr. Flaxer. I don't know.

Mr. Arens. Could it be done in a week?

Mr. Flaxer. I imagine it could be done in a week.

Mr. Arens. I respectfully suggest to the chairman that the witness be ordered to produce the information and transmit it to the subcommittee in 10 days' time.

Senator Watkins. Since you have made the reply that it could be done in a week, that will be the order of the committee, that you submit that information as requested by counsel for the committee within 10 days from this date. The record will show that you of course have been given that notice and that requirement has been made, and the order has been made.

Mr. Flaxer. I would like to suggest to the committee to reconsider that. I think you ought to consider it in light of the facts that organized labor in America will recognize in this a break in the wall that they have built up over half a century against the initiation of blacklists. I don't think that these lists can be looked upon in any other light than as blacklists.

Mr. Arens. Who is the vice president of the United Public Workers?

Mr. Flaxer. We don't have a vice president.

Mr. Arens. Who are the national officers of the United Public Workers of America?

Mr. Flaxer. I am, and Mr. Ewart Guinier.

Senator Watkins. May I direct your attention to the fact that this is an executive session and the records are not public here unless the order of the committee is to make them public. But at least for the present the records are to be delivered to the committee in executive session.

Mr Flaxer. Sir, on that I don't see any good purpose that these records would serve, even if I were to produce them. I think they are wholly irrelevant, if you say they are not to be made public.

Senator Watkins. I am not promising you they would not be made public, because I do not think the Government has to make such a promise to get the information.

Mr. Flaxer. I think, with all due respect to the committee, you are infringing here on an area which just crosses the boundaries of individual rights as well as trade-union rights far beyond the contemplation of any——

Senator Watkins. Whatever your argument is, that is the order now, and, as I understand it, you refuse to do so on the ground you set forth. I want to make the record clear.

Mr. Flaxer. I haven't got them, I don't feel capable of producing them.

Senator Watkins. You said you could do it within a week.

Mr. Flaxer. No; that was not the question he asked. He asked could the list be compiled within a week and I said it could.

Mr. Arens. The information is available to you?

Mr. Flaxer. Yes.

Mr. Arens. *But you have declined to produce it; is that correct?*

Mr. Flaxer. *I haven't produced them.*

Mr. Arens. Will you produce it pursuant to the order of the chairman of this session within 10 days from today?

Mr. Flaxer. I will have to take that under consideration.

Senator Watkins. That is the order, and of course we will have to take whatever steps are necessary if at the end of the time you have not produced them.

[All emphasis supplied.]

EDGERTON, *Chief Judge*, with whom BAZELON, *Circuit Judge*, concurs, *dissenting*: On October 5, the date named in the subpoena, appellant appeared before Senator Watkins, the Chairman of the subcommittee. No other member was present. Appellant produced other records called for by the subpoena, but asked the Chairman to withdraw the demand for membership lists, explaining in effect that he considered the lists privileged. After some discussion the Chairman said: "You are directed

by the committee to produce those records according to the terms of the subpoena."

But the Chairman was immediately asked to reconsider this direction. The appellant said: "Again I plead with the chairman and with the committee to reconsider the entire matter, because I think you are infringing on a right that workers in America have, including Federal employees. . . ." The Chairman and the appellant proceeded to discuss the claim of privilege at some length. At the end of this discussion, which occupies a full page of the printed record, the Chairman said, ". . . I do not think any court would ever resolve itself against the United States finding out what organization its members belong to." Mr. Arens, committee counsel, said, "I respectfully suggest to the chairman that the witness be ordered to produce the information and transmit it to the subcommittee in 10 days' time." The Chairman immediately said to the appellant, "Since you have made the reply that it could be done in a week, that will be the order of the committee, that you submit that information as requested by counsel for the committee within 10 days from this date."

This seems to me a clear case of immediate reconsideration of an order followed by immediate substitution of a different order.

After some further discussion, the following colloquy occurred: "Mr. Arens. Will you produce it pursuant to the order of the chairman of this session within 10 days from today? Mr. Flaxer. I will have to take that under consideration. Senator Watkins. That is the order, and of course we will have to take whatever steps are necessary if at the end of the time you have not produced them." The appellant never produced the records.

The indictment did not charge him with failing to produce the records within 10 days from October 5. It charged that appellant "on October 5, 1951 . . . willfully failed and refused to produce the records . . . ." The

case was tried on that theory alone. This colloquy occurred. "The Court. I expect to tell them to determine it as of the 5th, and that if they find there was no refusal and willful default on that date, that they must find him not guilty even though they believe that he defaulted at some other time. Mr. Hitz [Government counsel]. That's right. I believe that is the law." The court charged the jury: "you are to determine whether on that date, October 5, 1951, the defendant appeared before a subcommittee and then willfully failed and refused to produce the documents and then willfully did make default. If you find that he did not willfully make default at that time and place—that is, on October 5, 1951—then your verdict would be not guilty, even though you may believe that at some other time that he did willfully default. In other words, the question before you is whether there was a willful default on October 5, 1951, when he appeared before the committee."

In *Quinn* v. *United States*, 349 U.S. 155, 165-166, the Court said: "Clearly not every refusal to answer a question propounded by a congressional committee subjects a witness to prosecution under §192. Thus if he raises an objection to a certain question—for example, lack of pertinency or the privilege against self-incrimination—the committee may sustain the objection and abandon the question, even though the objection might actually be without merit. In such an instance, the witness's refusal to answer is not contumacious, for there is lacking the requisite criminal intent. . . . In short, unless the witness is clearly apprised that the committee demands his answer notwithstanding his objections, there can be no conviction under §192 for refusal to answer that question." The present appellant was clearly apprised that notwithstanding his objections, the Chairman demanded that he produce the records *within 10 days from October 5*. He was not apprised that, notwithstanding his objections, he must produce the records on October 5.

On the contrary, the Chairman made it clear that he need not produce them on that date and production within 10 days from that date would suffice. It follows that here, as in the *Quinn* case, the District Court should have directed a judgment of acquittal.

The *Quinn* case—which the Supreme Court had not yet decided—requires reversal for another reason as well. Soon after the hearing before the Chairman began, the present appellant raised an objection to the subpoena. He said: "I produced all the items called for in the subpena except . . . the item on membership lists of our union. The demand for the production of this item raises a number of profoundly serious issues. . . . Every individual who joins a union joins it with the confidence and trust supported by tradition and law that the act of joining and maintaining membership is a personal right and freedom that is inviolate. . . . I am confident that the members of this committee, after considering my views and after a study of the full implications of the request made in this subpena, will realize its conflict with the basic union tradition of this country now incorporated into Federal law and withdraw the demand for membership lists." Appellant was entitled, and in effect asked, to have his objection to the subpoena considered by "this committee", i.e. the subcommittee. It was not so considered. Under Senate rules, the chairman was a quorum "for the purpose of administering oaths and taking sworn testimony", but he was not a quorum for other purposes. The appellant, as soon as he was sworn, objected to the absence of a quorum. In many cases, including this one, the right to a quorum is more than a technicality. A quorum might have accepted appellant's view that the subpoena was invalid. Even if it had not accepted that view, it might have concluded that numbers of union members, not their names, were all that the committee needed, and might therefore as a matter of policy have withdrawn the demand for names.

In my view it is unnecessary to consider appellant's contention that the demanded records, particularly as to non-federal employees, were not pertinent to the committee's authorized investigation.

FAHY, *Circuit Judge*, dissents on the ground that the Subcommittee had empowered a single member only to administer oaths and to take sworn testimony and this power was not broad enough to include authority in but one member to rule upon objections to the production of documents called for by a subpoena *duces tecum*.

APPENDIX C—OPINIONS BELOW AFTER REMAND

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12027

ABRAM FLAXER, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

On Reargument of Appeal from the United States District Court for the District of Columbia Pursuant to Remand by the Supreme Court of the United States

Decided April 3, 1958

Mr. David Rein, with whom *Mr. Joseph Forer* was on the brief, for appellant.

Mr. William Hitz, Assistant United States Attorney, with whom *Mr. Oliver Gasch*, United States Attorney, and *Messrs. Lewis Carroll, John D. Lane* and *Harold D. Rhynedance, Jr.*, Assistant United States Attorneys, were on the brief, for appellee.

Before EDGERTON, Chief Judge, and PRETTYMAN, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON and DANAHER, Circuit Judges, sitting *en banc*. Circuit Judges BASTIAN and BURGER took no part in the hearing or decision of this case.

PRETTYMAN, *Circuit Judge:* In 1956 we affirmed the conviction of Flaxer for contempt.[1] The Supreme Court vacated our judgment and remanded[2] "for consideration in the light of *Watkins* v. *United States*".[3]

[1] Flaxer v. United States, 98 U.S. App. D.C. 324, 235 F. 2d 821.

[2] Flaxer v. United States, 354 U.S. 929, 1 L. Ed. 2d 1533, 77 S. Ct. 1392 (1957).

[3] 354 U.S. 178, 1 L. Ed. 2d 1273, 77 S. Ct. 1173 (1957).

In *Barenblatt*[4] upon similar remand we held that the Supreme Court in *Watkins* did not vitiate *in toto* the resolution of the House establishing the Un-American Activities Committee. We came to that conclusion for four reasons: (1) The Court did not say the resolution is invalid; (2) the Court discussed at length other points regarding pertinency, which discussion we deemed not to be *dictum*; (3) the Court cited and did not overrule a number of cases upholding convictions for contempt under the same resolution; and (4) the Court remanded the case to us for further consideration, a useless gesture if the resolution itself is invalid.

As we pointed out upon remand in *Sacher*[5] the Senate resolution here involved[6] is more precise than the House resolution criticized in *Watkins*. *A fortiori* this resolution was not struck down by the Court in its *Watkins* opinion.

We have, then, only the questions posed by *Watkins* as to pertinency. Even if the resolution is vague, Flaxer's responses to questions demonstrated that he knew what the subject of the inquiry was. In response to the *subpoena* he produced the financial and various other records of his union and, without objecting, presented them to the Committee on the record. He thus indicated that he recognized the nature of the question under inquiry. He refused to produce the membership lists but not upon the ground they were not pertinent. He objected on the ground that the Government as an employer is not entitled to know which of its employees belong to unions; he made an extensive statement of his position on that point.

Flaxer now seizes upon the word "irrelevant", used by him in one answer, as support for his claim that he

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[4] Barenblatt v. United States, —— U.S. App. D.C ——, ——, F. 2d —— (Jan. 16, 1958).

[5] Sacher v. United States, —— U.S. App. D.C. ——, —— F. 2d —— (Jan. 31, 1958).

[6] S. Res. No. 366, 81st Cong., 2d Sess. (1950).

objected to the question upon pertinency grounds. The Chairman had pointed out that the Committee was in executive session and that the records would not be public upon presentation unless so ordered by the Committee. The whole of Flaxer's answer was: "Sir, on that I don't see any good purpose that these records would serve, even if I were to produce them. I think they are wholly irrelevant, if you say they are not to be made public." In using the word "irrelevant" Flaxer was merely expressing his view of a presentation in private. The only meaning reasonably inferrable from his answer is that if not made public the records were irrelevant.

We affirm the judgment of the District Court.

Affirmed.

WASHINGTON, *Circuit Judge,* concurs in the result, finding no impediment in *Watkins,* or other controlling authority, to affirmance of the conviction.

FAHY, *Circuit Judge,* with whom EDGERTON, *Chief Judge,* and BAZELON, *Circuit Judge,* concur, dissenting: When the case was here before, prior to the *Watkins* decision of the Supreme Court, I dissented on the ground that the Internal Security Subcommittee of the Senate Committee on the Judiciary had empowered a subcommittee consisting of a single member to do no more than to administer oaths and to take sworn testimony.[1] This, I thought, did

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[1] Tr. 45-56. This action was in accordance with S. Res. 366, 81st Cong., 2d Sess., the resolution to which the Internal Security Subcommittee owes its authority. This resolution provides:

> A majority of the members of the [Judiciary] committee, or duly authorized subcommittee thereof, shall constitute a quorum for the transaction of business, except that a lesser number, to be fixed by the committee, or by such subcommittee, shall constitute a quorum for the purpose of administering oaths and taking sworn testimony.

96 Cong. Rec. 16872 (1950). See my dissent in *Sacher* v. *United States,* —— U.S. App. D.C. ——, —— F. 2d ——, n. 1.

not authorize the subcommittee consisting of the Chairman alone to rule upon appellant's objections to the production of documents called for by a subpoena *duces tecum* issued under authority of the parent Subcommittee. Contrary views prevailed in this court, after which the Supreme Court granted certiorari and remanded the case to us for reconsideration in the light of *Watkins*. 354 U.S. 929.

Under *Watkins* a delegation by Congress or by the Senate or the House of Representatives to an investigative committee must "spell out that group's jurisdiction and purpose with sufficient particularity. Those instructions are embodied in the authorizing resolution. That document is the committee's charter." 354 U.S. at 201. There the Court was considering the question of the committee's authorized scope of inquiry as it bore upon the pertinency of questions asked a witness. But the force of *Watkins* cannot be confined to issues of pertinency. *Watkins* requires as well clarity and certainty in the delegation of whatever power is sought to be exercised to compel obedience by a witness on pain of punishment for crime for not obeying. In that light *Watkins* fortifies the basis of my previous dissent. The charter here was the resolution of the parent Subcommittee delegating specified authority to a one-member subcommittee. To repeat, this subcommittee, before whom appellant appeared, was given authority only to administer oaths and to take sworn testimony. Its charter is expressed only in those terms. The broader authority claimed is not to be implied. Moreover, the reason for the particular character of the limited delegation is known. It was to avoid the defense of no quorum, that is, of no competent tribunal, in event a witness were prosecuted for perjury for testimony given under oath before a single member. See *Christoffel* v. *United States*, 338 U.S. 84. This purpose was accomplished by constituting one member a quorum to administer oaths and to take sworn testimony.

Like considerations fortify the dissenting opinion of Chief Judge Edgerton, in which Judge Bazelon concurred, when the case was here before. The Chief Judge stated,

> Appellant was entitled, and in effect asked, to have his objection to the subpoena considered by "this committee", i.e., the subcommittee. It was not so considered. Under Senate rules, the chairman was a quorum "for the purpose of administering oaths and taking sworn testimony", but he was not a quorum for other purposes.

98 U.S. App. D.C. 324, 334, 235 F. 2d 821, 831. "Other purposes" would include consideration of and decision upon appellant's repeated requests that he be not required to produce the membership lists called for by the subpoena *duces tecum*.

For these reasons I think the judgment of conviction should be reversed and the appellant discharged.

EDGERTON, *Chief Judge*, and BAZELON, *Circuit Judge*: Besides joining fully with Judge Fahy, we think the conviction should be reversed for the additional reason stated in our former dissent. 98 U.S. App. D.C. 324, 333, 235 F. 2d 821, 830.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 60

ABRAM FLAXER, *Petitioner*,

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinions issued in connection with the original decision below (R. 96-114) are reported at 235 F. 2d 821. The opinions issued on the second decision (R. 116-120) following remand of the case by this Court for reconsideration (R. 115) have not yet been reported.

JURISDICTION

The judgment of the Court of Appeals (R. 121) was entered on April 3, 1958. The petition for certiorari was filed on April 29, 1958, and certiorari was granted on June 9, 1958 (R. 122). The jurisdiction of the Court rests on 28 U.S. Code, sec. 1254 (1).

STATUTES AND RESOLUTIONS INVOLVED

Rev. Stat., Sec. 102, as amended, 2 U.S.C., sec. 192:

> Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

S. Res. 366, 81st Cong., 2d Sess. (1950) (96 Cong. Rec. 16862) provides in part:

> *Resolved,* That the Committee on the Judiciary, or any duly authorized subcommittee thereof is authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and

possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence.

SEC. 2. The committee, or any duly authorized subcommittee thereof, is authorized to sit and act at such places and times during the sessions, recesses, and adjourned periods of the Senate, to hold such hearings, to require by subpoenas or otherwise the attendance of such witnesses and the production of such books, papers, and documents, to administer such oaths, to take such testimony, to procure such printing and binding, and, within the amount appropriated therefor, to make such expenditures as it deems advisable. * * * Subpoenas shall be issued by the chairman of the committee or the subcommittee, and may be served by any person designated by such chairman.

A majority of the members of the committee, or duly authorized subcommittee thereof, shall constitute a quorum for the transaction of business, except that a lesser number, to be fixed by the committee, or by such subcommittee, shall constitute a quorum for the purpose of administering oaths and taking sworn testimony.

Senate Resolution 180, 81st Cong., 2d Sess. (96 Cong. Rec. 1284) amended subsection (3) of Rule XXV of the Standing Rules of the Senate, to read as follows:

3(a) Except as provided in paragraph (b) of this subsection, each standing committee, and each subcommittee of any such committee, is authorized to fix the number of its members (but not less than one third of its entire membership) who shall constitute a quorum thereof for the transaction of

such business as may be considered by said committee subject to the provisions of Section 133(d) of the Legislative Reorganization Act of 1946.

(b) Each standing committee, and each subcommittee of any such committee, is authorized to fix a lesser number than one third of its entire membership who shall constitute a quorum thereof for the purpose of taking sworn testimony.

The new matter introduced by Resolution 180 is subparagraph (b). Unless changed, the rules of one session of the Senate carry over into the next (R. 35).

QUESTIONS PRESENTED

1. Whether the conviction of a union president for contempt of Congress for refusing to produce to the Senate Internal Security Subcommittee the names and addresses of the 35,000 members of his labor union may be sustained, there being no evidence of the subject under inquiry, of the pertinency of the documents demanded, of the purpose for which the subcommittee desired the names, or of the use to which the names would be put, and no showing of a legislative purpose for the demand.

2. Whether it was permissible for the court below to find pertinency and a legislative purpose in the absence of evidence on the subject, by conjecturing that the Subcommittee desired the names of the Union's members in order to check them "against a list of subversives to determine the extent of infiltration into the union."

3. Whether the purpose conjectured by the court below is a valid legislative purpose and consistent with the Constitution.

4. Whether the authority of the Internal Security Subcommittee is so vague that it may not constitutionally support the use of compulsory process.

5. Whether the conviction was invalid because petitioner objected at the Subcommittee hearing that the demanded documents were irrelevant and served no legislative purpose, and yet the Subcommittee failed to state the subject under inquiry, the pertinency of the documents, or the legislative purpose.

6. Whether under the Senate rules and the Senate resolution establishing the Subcommittee, one member of the Subcommittee constituted a quorum for the purpose of ruling on objections to the validity of a subpoena duces tecum to produce the names and addresses of 35,000 members of a labor union.

7. Whether petitioner was guilty of a wilful default for the failure to produce the membership lists at a hearing at the conclusion of which he was directed to produce the documents not then and there, but within ten days.

STATEMENT OF THE CASE

The petitioner was convicted on both counts of a two-count indictment (R. 2-3) charging him with violating 2 U.S. Code, sec. 192, by refusing to produce certain records before the Subcommittee on Internal Security of the Senate Committee on the Judiciary.

The Subcommittee Proceedings

On September 19, 1951, petitioner, then national president of a labor union, the United Public Workers of America (R. 39), was served with a subpoena duces tecum of the Subcommittee on Internal Security of

the Senate Committee on the Judiciary (R. 37, 64). The subpoena directed production on October 5, 1951 of records of the Union[1] showing (1) certain financial data, (2) the names and addresses of all Union members employed by the federal government, and (3) the names and addresses of all Union members employed by any state, county or municipal government. The subpoena gave no indication of the subject matter of the inquiry. (R. 63-4.)

The Union had approximately 35,000 members, and since these were all government employees, compliance with the subpoena would have required petitioner to produce, in addition to financial information, the names and addresses of the Union's entire membership. Five percent of the members were federal employees, most of whom worked for the Bureau of Engraving, the Post Office and the Veterans Administration. The rest of the Union's members were employees of state, county and municipal governments, mostly the last. (R. 43-4, 53.)

The subpoena had been prepared and apparently sent to Senator McCarran, then Subcommittee chairman, by two members of the Subcommittee staff, who were acting, so far as appears, without advance authorization or approval of the Subcommittee (R. 53-61).

Petitioner appeared before the Subcommittee on October 5, 1951. Only one member of the Subcommittee, Senator Watkins, was present. At the outset of the hearing, petitioner objected to the absence of a

[1] Erroneously named in the subpoena as "United Professional Workers of America" (R. 63, 42).

quorum. Senator Watkins overruled his objection. (R. 38-9.)

At the hearing, petitioner produced, as demanded by the subpoena, Union records showing the amount, source and place of deposit of the Union's funds and the organizations to which the Union had contributed during the preceding twelve months (R. 39-41). Petitioner was asked various questions about the Union, all of which he answered, including questions on its methods of operation, the number of its members, and where the members were employed (R. 43-46).

The petitioner objected, however, to those portions of the subpoena which demanded the production of the names and addresses of the Union's members. He argued that these demands invaded "the rights of unions to the privacy of their membership records" and that experience taught that invasions of this privacy served "to compile blacklists for the sole purpose of destroying unions" (R. 41). He added (R. 42):

> "Every individual who joins a union joins it with the confidence and trust supported by tradition and law that the act of joining and maintaining membership is a personal right and freedom that is inviolate. A request such as the present constitutes a wholesale invasion of such privacy and the 'right to be let alone' which is protected by the fourth amendment. Every trade-union member imposes a special trust in his union officers to protect and preserve that right. Therefore, to submit to the request in this subpoena would be a violation of the trust imposed in me by my membership and a betrayal of the entire trade-union movement in this country. I have no doubt that not a single union president would find it possible to comply with such a request.

> "I am confident that the members of this committee, after considering my views and after a study of the full implications of the request made in this subpoena, will realize its conflict with the basic union tradition of this country now incorporated into Federal law and withdraw the demand for membership lists."

Petitioner said that he did not have the list of Union members with him because he considered the demand for the list to be improper. Senator Watkins then stated: "You are directed by the committee to produce those records according to the terms of the subpena." (R. 47.)

Petitioner immediately asked for reconsideration, urging that the Subcommittee was violating a national policy, manifested in federal legislation, against an employer's asking the names of union members (R. 47-8). Senator Watkins replied: "I do not think there is any law or any court holding that the United States itself cannot find out the names of a union and the people who belong to it that are in its employ" (R. 48).

In reply to a question by Richard Arens, the Subcommittee's counsel, petitioner said that the information called for could be compiled in a week (R. 49). The following then occurred (R. 49-50):

> "Mr. Arens. I respectfully suggest to the chairman that the witness be ordered to produce the information and transmit it to the subcommittee in 10 days' time.
>
> Senator Watkins. Since you have made the reply that it could be done in a week, that will be the order of the committee, that you submit that information as requested by counsel for the committee within 10 days from this date. . . .

Mr. Flaxer. I would like to suggest to the committee to reconsider that. I think you ought to consider it in the light of the facts that organized labor in America will recognize in this a break in the wall that they have built up over half a century against the initiation of blacklists. I don't think that these lists can be looked upon in any other light than as blacklists.

* * * *

Senator Watkins. May I direct your attention to the fact that this is an executive session and the records are not public here unless the order of the committee is to make them public. But at least for the present the records are to be delivered to the committee in executive session.

Mr. Flaxer. Sir, on that I don't see any good purpose that these records would serve, even if I were to produce them. I think they are wholly irrelevant, if you say they are not to be made public.

Senator Watkins. I am not promising you they would not be made public, because I do not think the Government has to make such a promise to get the information.

Mr. Flaxer. I think, with all due respect to the committee, you are infringing here on an area which just crosses the boundaries of individual rights as well as trade-union rights far beyond the contemplation of any—

Senator Watkins. Whatever your argument is, that is the order now . . .

* * * *

Mr. Arens. The information is available to you?

Mr. Flaxer. Yes.

* * * *

Mr. Arens. Will you produce it pursuant to the order of the chairman of this session within 10 days from today?

Mr. Flaxer. I will have to take that under consideration.

> Senator Watkins. That is the order, and of course we will have to take whatever steps are necessary if at the end of the time you have not produced them."

Petitioner did not supply the membership lists within the ten day period (R. 71).

At no time during the hearing did the Subcommittee state the subject of the inquiry, the purpose for which the subpoenaed membership lists was desired, or what use would or could be made of the lists by the Subcommittee.

The Court Proceedings

Petitioner was indicted on two counts. The first count charged that on October 5, 1951 (the date of the Subcommittee hearing) he had wilfully refused to produce the names and addresses of all Union members employed by the federal government. The second count charged that on the same date he had wilfully refused to produce the names and addresses of all Union members employed by any state, county or municipal government. (R. 2-3.)

At the trial, the government introduced the subpoena (R. 63-4), the transcript of the Subcommittee hearing (R. 38-50, 65-70), and testimony of Richard Arens, counsel for the Subcommittee (R. 32, 62). Arens testified that the Subcommittee had information that petitioner, the Union's secretary-treasurer, its former negotiations director, and "certain" members of its executive board were members of the Communist Party (R. 51-3). Neither Arens nor any other witness gave any testimony as to what was the subject under inquiry or the pertinency of the Union's membership list to any subject. Nor is there any evidence in the

record of why the Subcommittee wished the names and addresses of the 35,000 union members or what use it intended to make of that information.

The trial court denied a motion for judgment of acquittal (R. 14-20). She instructed the jury as a matter of law that the Subcommittee was authorized to obtain from the petitioner the documents demanded by the subpoena, that the documents "were pertinent to the study and investigation that the subcommittee was making," and that "there was a quorum of the committee " (R. 89). She also instructed the jury, with the acquiescence of both parties (R. 79), that the question was whether there was a wilful default on October 5, 1951, when petitioner appeared before the Subcommittee, and that if he did not wilfully default at that time, the verdict should be not guilty even though the jury might believe that at some other time he did wilfully default (R. 91). Petitioner was convicted on both counts and sentenced to imprisonment for two months and a fine of $1,000.00 (R. 20-1).

The appeal was first heard below by a regular three-judge panel of the Court of Appeals, composed of Chief Judge Edgerton and Circuit Judges Miller and Fahy. Two members of this panel, Chief Judge Edgerton and Judge Fahy, were eventually to vote to reverse the conviction. However, before the panel had announced a decision, the Court of Appeals on its own motion ordered reargument before the court in banc. The in banc court affirmed by a vote of four to three (R. 96-114).[2]

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[2] Judges Prettyman, Miller, Washington and Danaher composed the majority. Chief Judge Edgerton and Judges Bazelon and Fahy dissented. Judges Bastian and Burger did not participate.

The majority of the Court of Appeals, in an opinion by Circuit Judge Miller, held that the Subcommittee's inquiry was justified under the third clause of its enabling resolution, authorizing it to study and investigate the "extent, nature and effects of subversive activities in the United States . . . including but not limited to espionage, sabotage and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world communist movement or any other movement seeking to overthrow the Government of the United States by force or violence." It ruled that against the background of this provision and anti-Communist legislation "the pertinency of the membership list demanded by the subpoena is at once apparent . . . . The names could be used to check against a list of subversives to determine the extent of infiltration into the union, a matter clearly pertinent under the Resolution, particularly since this is a Government employees' union, even though the names of state and local members are included." (R. 103-4.)

On petition for certiorari, this Court vacated the judgment below without hearing argument, and remanded the case for consideration in the light of *Watkins* v. *United States*, 354 U.S. 178 (R. 115). See *Flaxer* v. *United States*, 354 U.S. 929.

On the remand, the court below reaffirmed the conviction by a vote of 4-3 (R. 120-1).

SUMMARY OF ARGUMENT

I

A. A conviction for contempt of a congressional committee may be sustained only if (1) the questions asked or documents subpoenaed are pertinent to the matter

under inquiry by the committee conducting the investigation, (2) the inquiry serves a valid legislative purpose which the witness' recalcitrance has frustrated, and (3) the congressional need for the particular information outweighs the witness' right of privacy. These essential elements may not be presumed or conjectured. They must be proved by the prosecution.

In the present case the record does not indicate the subject under inquiry. Still less does it show the pertinency of the Union membership list to the unidentified subject under inquiry. Nor was there any evidence which would indicate the Subcommittee's need for the list or the intended use of the list.

The transcript of the hearing contains nothing which indicates these matters. The only other evidence introduced at the trial was the testimony of counsel for the Subcommittee that the Subcommittee had in its files information that some of the Union's officers and executive board members were members of the Communist Party. This without more does not demonstrate the essential elements of the case.

Since there was no evidence of the subject under inquiry, pertinency or legislative purpose, a judgment of acquittal should have been entered below.

B. The indictment made two counts out of a single subpoena which demanded not only the names and addresses of Union members employed by the federal government, but also the "names and addresses of all members who are employed by state, county or municipal governments". In so far as the subpoena demanded the names and addresses of employees of state and local governments, it was at least prima facie beyond the jurisdiction of the Subcommittee and of Con-

gress itself. The control of state and local government personnel is within the reserved power of the states. This was not a field within which Congress could legislate, and therefore the inquiry was ultra vires. Even if one could conceive circumstances in which it would be of legitimate federal concern to ascertain the union affiliations of certain state and local government employees, no such circumstances were shown here.

Since the demand for the names of Union members who were employed by state, county or municipal governments was invalid, the conviction on both counts must fall, even if the demand for the names of Union members who were federal employees were valid, since a conviction cannot stand for disobedience of a partially invalid subpoena.

C. In upholding the conviction, the court below departed from all standard principles governing prosecutions for contempt of Congress. In the face of a record which was barren of evidence as to the subject under inquiry, the pertinency of the membership list, and legislative purpose, the court conjectured these necessary elements. Its conjectures were not only unfounded, but were also unconstitutional bases for the Subcommittee's inquiry.

The first opinion of the court held that the membership list was pertinent to the third clause of the Subcommittee's charter because the "names could be used to check against a list of subversives to determine the extent of infiltration into the union." There was, however, no evidence that the subject of the inquiry was infiltration into the Union, or that the purpose of the demand was to check the names of Union members

against a master list of "subversives", or that the Subcommittee had such a master list, or what legislative use would be made of the list as checked-off. It is not a legislative function for the Congress to occupy itself with compiling political dossiers of individuals and to maintain lists of "subversives." This demand for a wholesale list of names in the absence of any showing of a legitimate legislative purpose was a violation of the First, Fourth and Fifth Amendments.

The prevailing opinion on the remand did not refer specifically to the theory originally advanced by the majority below, nor did it advance any new theory of the subject of the inquiry or the pertinency of the membership list. Yet it seems to have switched from the third clause of the Subcommittee's charter to the first two clauses, as authorizing the inquiry into an unidentified subject. The opinion ruled, erroneously, that the petitioner knew what the unidentified subject was. Even if petitioner had had such knowledge, this would not have relieved the court below of its obligation to determine and state what that subject was, whether the membership list was pertinent to that subject, and whether the demand for the list served a legitimate legislative purpose.

II

Watkins held as a requirement of due process that a witness before a congressional committee is entitled to have knowledge of the subject under inquiry and the pertinency of any questions to that subject. In the present case there was no statement at the hearing as to the subject under inquiry or the pertinency of the membership list.

The prevailing opinion below on remand avoided this problem by holding that petitioner knew the subject of the inquiry, since he answered some of the Subcommittee's questions and produced without objection financial records of his Union. This has no semblance of logic. Petitioner's answering of some questions and production of some records did not in any way reveal knowledge of the subject under inquiry, the pertinency of withheld records, or what legislative purpose could be served by the Subcommittee's demands.

The court below also held that petitioner was not entitled to an explanation of the pertinency of the membership list since he had not, according to the court, objected on the ground of lack of pertinency. In fact petitioner had stated at the hearing that the demand for the membership list was a wholesale invasion of privacy, that it was being demanded for the purpose of compiling a blacklist, that it was an "improper command," and that the records would not serve any good purpose and were "wholly irrelevant." He was also cut off in the middle of an objection and told that the demand stood no matter what his objections were. Petitioner accordingly did in fact challenge the pertinency and legislative purpose of the Subcommittee's demand for the membership list.

III

Watkins held that a witness cannot be adjudged guilty of contempt for refusing to answer questions of a congressional investigating committee chartered by a vague resolution. The resolution here involved is in three clauses. The original opinion of the court below justified the demand under the language of the

third clause. Moreover, on this record, it is impossible to tell which clause the Subcommittee was acting under. It follows, therefore, that the subpoena is vulnerable if any one of the authorizations to which it might relate is insufficient to support it.

Although all three clauses seem of dubious definiteness, the third clause is most obviously vague. Its key term, "subversive activities," is as nebulous as the language employed in the charter of the Un-American Activities Committee, which *Watkins* held was too vague to support a conviction of contempt.

IV

A single member of the seven man Subcommittee presided at the hearing and overruled petitioner's objections to the production of the Union membership list and to the absence of a quorum. Under the Senate rules and the Subcommittee's enabling resolution, one Senator was not a quorum for the purpose of ruling on petitioner's objections to the subpoena. Hence petitioner's objections were never overruled by a competent tribunal, and he cannot be held guilty of contempt.

The Senate rules and the Subcommittee's charter permit one Senator to be a quorum "for the purpose of taking sworn testimony," but a majority is necessary for the "transaction of business." The authorization to take "sworn testimony" by its terms excludes authority to deal with documents. Furthermore, the legislative history of the Senate Rule shows that the exception for smaller testimonial quorums was intended only for the narrow purpose of enabling perjury prosecutions for false testimony given before less than an ordinary quorum. The resolution was not in-

tended to authorize a one-man subcommittee to rule on objections to the production of documents.

V

At the hearing, the petitioner was told that he need not produce the membership list on that date but should produce it within ten days. The validity of this new order and whether or not the petitioner was in contempt for a failure to comply with it did not come within the scope of the issues raised by the indictment or considered at the trial, and petitioner's conviction must rest on the theory that the contempt was complete at the hearing.

Petitioner could not be found guilty of a wilful default of the subpoena, unless, after consideration of his objections to the validity of the subpoena, he was directed to produce the membership list. But he was not so directed. On the contrary, he was told that he need not produce the membership list then and there, but should produce it within ten days. In effect the order contained in the subpoena was vacated, and a new order substituted. Since there was no direction to produce the membership list at the hearing, petitioner could not validly be held guilty of committing a contempt on the day of the hearing.

ARGUMENT

I. THE CONVICTION MUST BE REVERSED BECAUSE THERE WAS NO SHOWING OF THE SUBJECT OF THE INQUIRY, OF THE PERTINENCY OF THE DOCUMENTS DEMANDED, OR OF A LEGISLATIVE PURPOSE FOR THE DEMAND

A. The Prosecution Did Not Carry the Burden of Proving These Essential Elements

A conviction for contempt of a Congressional committee may be sustained only if:

(1) The questions asked or documents subpoenaed are pertinent to the matter under inquiry by the committee conducting the investigation. *Quinn* v. *United States*, 349 U.S. 155, 161; *United States* v. *Rumely*, 345 U.S. 41; *Sinclair* v. *United States*, 279 U.S. 263; *McGrain* v. *Daugherty*, 273 U.S. 135.

(2) The inquiry serves a valid legislative purpose, which the witness' recalcitrance has frustrated. As stated in *Watkins* v. *United States*, 354 U.S. 178: "There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. . . . No inquiry is an end in itself; it must be related to and in furtherance of a legitimate task of the Congress." (At 187.) And, "an investigation into individual affairs is invalid if unrelated to any legislative purpose." (At 198.) *Jurney* v. *MacCracken*, 294 U.S. 125, 148, earlier established that a refusal to furnish information to a Congressional committee is punishable only if it "obstructs the performance of the duties of the legislature." Cf. *Marshall* v. *Gordon*, 243 U.S. 521.

(3) The "congressional need for the particular information" must be balanced against, and must outweigh, "the individual and personal interest in

privacy." "The critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness. We cannot simply assume, however, that every congressional investigation is justified by a public need that over-balances any private rights affected." (*Watkins* at 198.)

These essential elements may not be presumed or conjectured. The prosecution must prove pertinency and legislative purpose. *Sinclair* v. *United States, supra,* at 296, 297; *United States* v. *Rumely, supra; Watkins* v. *United States, supra; Bowers* v. *United States,* 202 F. 2d 447.

In the present case the record does not even indicate the subject which was under inquiry by the Subcommittee. Still less does it show the pertinency of the specified records demanded to the unidentified subject under inquiry. Nor was there any evidence indicating the Subcommittee's need for the list of Union members or the intended use of the list. Hence there is no showing of any legislative purpose for the information demanded and refused.

The transcript of the hearing before the Subcommittee contains nothing which indicates the subject under inquiry, the pertinency of the records demanded, or the legislative purpose for the demand. On the contrary, the single Senator who presided never contradicted the repeated assertion made by petitioner at the hearing (R. 41, 42, 47, 48, 49, 50) that production of the membership list would serve no valid or useful purpose and would be utilized for the non-legislative purpose of blacklisting. (Cf. *Watkins,* at 200, "We have

no doubt that there is no congressional power to expose for the sake of exposure," and at 187, "Nor is the Congress a law enforcement or trial agency.") Further, as we have seen, the issuance of the subpoena was not preceded by a considered judgment of the Subcommittee that the information demanded was necessary or even useful for legislative business. It was perfunctorily signed by the chairman of the Committee and even named the wrong organization. (See *supra*, p. 6).

Other than the transcript of the hearing, the only evidence introduced at the trial was the testimony of counsel for the Subcommittee that the Subcommittee had in its files information that some of the Union's officers and executive board members were members of the Communist Party. But this circumstance without more does not by any rational process demonstrate what was the subject under inquiry, the pertinency of the list, or the purpose for which the list was sought.

In contrast to the vacuity of the government's proof is the unprecedented and sweeping nature of the subpoena. Never before has a labor union officer been convicted for refusing to produce to a Congressional committee the membership lists of his union. Never before, so far as we have been able to ascertain, has a committee made such a sweeping demand. The Subcommittee's unprecedented subpoena, insisted upon by a single Senator, sought to invade the privacy of the 35,000 individuals who were members of the Union. These were to be stigmatized by being listed in the archives of a committee operating in the area of internal security, and would thereafter be ever subject to public defamation at some crucial point in their

affairs.[3] As stated in *Watkins*, at 197, "Those who are identified by witnesses and thereby placed in the same glare of publicity are equally subject to public stigma, scorn and obloquy." The Subcommittee's subpoena also infringed the hard-won tradition of the American labor movement that labor unions should not be required to divulge the names of their members.

In *Watkins*, the Court set aside for lack of a legislative purpose an attempted invasion of the privacy of a few former members of the Communist Party, whom the witness had refused to name. The attempted invasion of privacy here makes that involved in *Watkins* pale into insignificance.

Because there was not introduced any evidence of the subject under inquiry, pertinency, or legislative purpose, the trial court erred in denying petitioner's motion for a judgment of acquittal (R. 77-8, 20-1) and the court below erred in affirming the conviction.

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[3] Jacob K. Javits, then Attorney General of New York, discovered on the eve of his nomination as a Republican candidate for the United States Senate, that he was being attacked as a security risk on the basis of testimony which had been received by this same Subcommittee. Senator Javits was eventually accorded the privilege of testifying before the Subcommittee in order to clear himself. See 1956 Cong. Quarterly Almanac, pp. 732-3; N. Y. Times, Sept. 4, 7 and 10, 1956. On April 4, 1957, E. Herbert Norman, Canadian Ambassador to Egypt, committed suicide following this Subcommittee's release of derogatory information it had received concerning him in closed hearings—Mr. Norman having been previously cleared of the accusations by his own government. The Canadian government sent a formal protest to this government, and the Department of State expressed its condolences and regrets. N. Y. Times, April 5, 11 and 13, 1957.

B. The Invalidity of the Subpoena Is Aggravated by the Demand for the Names of State, County and Municipal Employees

The indictment (R. 2-3) made two counts out of a single subpoena which demanded not only the names and addresses of Union members employed by the federal government, but also the "names and addresses of all members who are employed by any state, county or municipal government located anywhere within the United States of America" (R. 63). As we have seen, ninety-five percent of the names demanded were in this latter category.

Insofar as the subpoena demanded the names and addresses of employees of state and local governments, it was, as we later show, at least prima facie beyond the jurisdiction of the Subcommittee and of Congress itself. Since this presumption was never rebutted by evidence, this demand was invalid. Accordingly, the conviction on both counts must fall, even if the demand for the names of Union members who were federal employees were valid, since a conviction cannot stand for disobedience of a partially invalid subpoena. In *Bowman Dairy Co.* v. *United States,* 341 U.S. 214, a witness had been subpoenaed to produce three sets of records, listed separately in the subpoena in paragraphs lettered (a), (b) and (c). The witness failed to produce any of the records and was held in contempt. The Court held that the witness was required to produce the items listed in paragraphs (a) and (b), but not in (c). Nevertheless, the Court reversed the contempt conviction on the ground that since part of the subpoena was bad the witness could not be punished for refusing to comply with the parts that were good. The Court stated (at 221):

> "One should not be held in contempt under a subpoena that is part good and part bad. The burden is on the court to see that the subpoena is good in its entirety and it is not upon the person who faces punishment to cull the good from the bad."

This same principle was applied to a congresssional subpoena in *United States* v. *Patterson,* 206 F. 2d 433.

The investigative power of Congress is, of course, ancillary to its legislative powers and cannot be employed in fields within which Congress may not legislate. *Kilbourn* v. *Thompson,* 103 U.S. 168; *Quinn* v. *United States, supra; Watkins* v. *United States, supra, McGrain* v. *Daugherty, supra; Re Chapman,* 166 U.S. 661; *Barry* v. *United States,* 279 U.S. 597. In this case, the Subcommittee asserted power to inquire into the organizational affiliations of state and local government employees. This was not a field within which Congress could legislate, being within the reserved powers of the states, and therefore the inquiry was ultra vires. This is particularly true because the inquiry was obviously of a kind which was an interference with government-employee relations, and not merely an innocuous gathering of information for legislative use.

Surely if there is anything within the reserved power of the states, it is control of state and local government personnel. The qualifications and affiliations of such employees are matters of internal state administration over which the federal government has no control, and into which therefore it cannot inquire. So the Court has said:

> "The legislative power of a State, except so far as restrained by its own Constitution, is at all times absolute with respect to all offices within its reach.

It may at pleasure create or abolish them, or modify their duties. It may also shorten or lengthen the term of service. And it may increase or diminish the salary or change the mode of compensation." (*Newton* v. *Mahoning County,* 10 Otto (100 U.S.) 548, 549.)

"And we think it clear that the Federal Government, under the Constitution, has no power to impose on a state officer, as such any duty whatever, and compel him to perform it . . ." (*Ex Parte Kentucky* v. *Dennison,* 24 How. (65 U.S.) 66, 107.)

"In its internal administration the state (so far as concerns the Federal government) has entire freedom of choice as to the creation of an office for purely state purposes, and of the terms upon which it shall be held by the person filling the office." (*Wilson* v. *North Carolina,* 169 U.S. 586, 594.)

Even if one could conceive circumstances in which it would be of legitimate federal concern to ascertain the union affiliations of certain state and local government employees, no such circumstances were shown here. Nor would it be appropriate to advance speculative grounds for federal interest in state employment. Since state employment is peculiarly a matter of state concern and internal administration, Congress cannot intervene in state employment matters unless there is a clear showing of federal interest. This Court has recognized that it is "a principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the Federal power must clearly appear." *Florida* v. *United States,* 282 U.S. 194, 211-2. See also *Linder* v. *United States,* 268 U.S. 5, 17.

The fact is that the Subcommittee had no more business inquiring into the union affiliations or political

attitudes of, say, the garbage collectors of Akron, than it had to investigate the "loyalty" of a member of the Canadian diplomatic service. It is significant that at the Subcommittee hearing, Senator Watkins, the only member present, himself seems to have recognized that the Subcommittee had no legitimate interest in the demand for the names of state and local government employees. Thus the following colloquy occurred at the hearing (R. 48-9):

> "Senator Watkins: I would not argue with you for employees outside of the Government service, or state, county and municipal service. I am not going to argue that question because it is not at issue here. But we have here now an organization made up of people who are working for Government and we are asking you specifically for the names of those who are working for the Government.[4] You have that within your information and *I do not think there is any law or any court holding that the United States itself cannot find out the names of a union and the people who belong to it that are in its employ.*
>
> Mr. Flaxer: Sir, I don't think the issue has ever come up before.
>
> Senator Watkins: *Maybe it has not, but I do not think any court would ever resolve itself against the United States finding out what organization its members belong to.*" (R. 48-9, emphasis supplied.)

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[4] Earlier in the hearing, Arens, counsel for the Subcommittee, had said (R. 45): "Do you have membership in almost all of the Government agencies? By 'Government' I mean the Federal Government agencies."

C. The Justifications of the Subpoena by the Court Below Are Unfounded and Unconstitutional

In upholding the validity of the Subcommittee's demands, the court below departed from all standard principles governing prosecutions for contempt of Congress. In the face of a record which, as we have seen, was barren of evidence as to the subject under inquiry, the pertinency of the lists demanded, and legislative purpose, the court conjectured these necessary elements. Its conjectures were not only unfounded, but were also unconstitutional bases for the Subcommittee's inquiry.

Originally, the majority below, in an opinion by Judge Miller, held (R. 103-4) that the Subcommittee's inquiry was justified under the third clause of the Subcommittee's enabling resolution, that authorizing it to study and investigate the "extent, nature and effects of subversive activities in the United States . . . including but not limited to espionage, sabotage and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world communist movement or any other movement seeking to overthrow the Government of the United States by force or violence" (*supra*, pp. 2-3).

Following the remand, the prevailing opinion by Judge Prettyman held (R. 117):

> "As we pointed out upon remand in *Sacher*, the Senate resolution here involved is more precise than the House resolution criticized in *Watkins*. *A fortiori* this resolution was not struck down by the Court in its *Watkins* opinion."

This reliance upon the court's earlier decision in *Sacher* v. *United States*, 252 F. 2d 828, reversed on

petition for certiorari, 356 U.S. 576, represented a shift in the court's theory of the Subcommittee's authority for the inquiry in this case. For in *Sacher* the court below had held that the Senate resolution was sufficiently precise solely with respect to the first two clauses of the resolution.[5] See 252 F. 2d at 831-2. Although the court below did not explain, or even expressly acknowledge, this change of theory, it is significant that the intervening decision of this Court in *Watkins* had obviously imperilled the validity of the third clause of the Subcommittee's charter, which suffers from the same vagueness which, *Watkins* held, afflicted the charter of the House Committee on Un-American Activities. In any event, the ability of the court below to supply first one basis and then another for the Subcommittee's inquiry furnishes another demonstration that the Subcommittee's demands had no defined legislative purpose.

Judge Miller's opinion accommodated itself to the third clause of the authorizing resolution by holding that the Subcommittee was investigating Communist infiltration of the Union (R. 97), and that against the "background" of this clause and anti-Communist legislation, "the pertinency of the membership list demanded by the subpoena is at once apparent. . . . The names could be used to check against a list of subversives to determine the extent of infiltration

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[5] Those authorizing the investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950, and (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States. *Supra*, p. 2.

into the union, a matter clearly pertinent under the Resolution, particularly since this is a Government employees' union, even though the names of state and local members are included" (R. 104).

The first objection to this theory is that it is an improvisation of the facts. There is no evidence that (1) the subject of the inquiry was infiltration of the Union, or (2) that the purpose of the demand was to check the names of Union members against a master list of "subversives," or (3) that the Subcommittee had such a master list, or (4) what legislative use would be made of the checked-off list.

If a legislative purpose, no matter how fantastic, may be conjectured by the appellate court for any demand, no matter how extravagant, the principle that Congressional investigations must have a legislative purpose becomes merely a paper requirement. Yet this has now occurred for the jurisdiction in which most Congressional investigations are held and in a period when abuse of the inquiry power is most prevalent. See Barth, *Government by Investigation* (1955); Taylor, *Grand Inquest* (1955), especially c. IV; Chafee, *The Blessings of Liberty* (1956) p. 221; *United States* v. *Rumely, supra,* at 44; *Watkins* v. *United States, supra,* at 195.

The second objection to the court's theory is that it is hard to imagine a more illegal purpose than that conjectured. Surely it is not a legislative function for the Congress to occupy itself with compiling political dossiers of individuals, including persons not employed by the federal government, and to maintain lists of "subversives."

Judge Miller's opinion did not suggest in what manner the checking of names against a "list of subversives" could possibly assist Congress in its legislative work. The demand for a wholesale list of names, in the absence of any showing of a legitimate legislative purpose, was not only ultra vires, but was also a violation of the First, Fourth and Fifth Amendments. Cf. *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449. See also *Federal Trade Commission* v. *American Tobacco Company,* 246 U.S. 298; *Jones* v. *S. E. C.,* 298 U.S. 1. The issue here is not one of the power of Congress to investigate but rather whether Congress has power to investigate without limit or cause. As this Court said in the *Sinclair* case, *supra,* at p. 292:

> "It has always been recognized in this country, and it is well to remember, that few if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs."

To the same effect, Mr. Justice Brandeis stated in his dissent in *Olmstead* v. *United States,* 277 U.S. 438, 478:

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right,

every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the 4th Amendment."

If the decision below is allowed to stand, the Subcommittee will have the power to subpoena, for irresponsible reasons or no reason, the names and addresses of the one and a half million members of the Teamsters Union, of the million members of the United Automoble Workers, and, for that matter, of almost any organization. For it can always be speculated, as did the court below in this case, that the Subcommittee desires to check the names of the organization's members against a supposed master list of "subversives." Similarly, the Subcommittee could demand, under the slogan of investigating security and without further showing, the names of all employees of and subscribers to the New York Times.[6]

In this case, it is true, the Subcommittee had derogatory information about some of the organization's leaders. But if such a foundation is necessary, it is, under current conditions, child's play to supply it, particularly for a Subcommittee which can develop derogatory security information about a Republican Attorney General of New York, a Canadian ambassador to Egypt, and the New York Times.

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[6] In 1955 and 1956, one of the Subcommittee's major investigations consisted of searching for "subversives" on the staff of the New York Times, an undertaking commonly understood to be not unconnected with that newspaper's stand in favor of school integration in the South. See 1956 Cong. Quarterly Almanac, p. 732; 1957 Annual Report of the Subcommittee, pp. 97, 100, 103-6; N. Y. Times editorial, Jan. 5, 1956; N. Y. Times, Jan. 5, 1956 and Apr. 20, 1956; Wash. Post & Times-Herald, Jan. 5, 7 and 10, 1956, Apr. 24, 1956; *United States* v. *Peck*, 154 F. Supp. 603.

Judge Prettyman's opinion, as we have seen, abandoned the original majority view that the Subcommittee was operating under clause three of its enabling resolution. This inevitably made irrelevant the supposition that the Subcommittee was investigating Union infiltration, a subject which was supposedly pertinent to the third clause of the resolution. However, despite the emphasis in *Watkins* on the need to ascertain the subject under inquiry, Judge Prettyman did not advance any new theory of the subject of the inquiry or pertinency. Instead, without referring to the earlier theory and without advancing one of his own, he simply asserted that the petitioner knew what the unidentified subject was (R. 117).

As we later show (*infra*, p. 34), there is no basis for the finding that petitioner knew the subject under inquiry. But even if petitioner had such knowledge, this would not relieve the court below of its obligation to determine and state what that subject was, whether the demand of the Subcommittee was pertinent to it, and whether it served a legitimate legislative purpose. *Watkins* also recognized (at 198-9) that the Constitution places upon the judiciary the responsibility of performing the "arduous and delicate task" of accommodating "the congressional need for particular information with the individual and personal interest in privacy," so as "to ensure that the Congress does not unjustifiably encroach upon an individual's right to privacy nor abridge his liberty of speech, press, religion or assembly." Although this case was remanded to the court below for consideration in the light of *Watkins*, it is clear that the court did not discharge this responsibility.

II. THE CONVICTION MUST BE SET ASIDE BECAUSE PETITIONER WAS NOT INFORMED OF THE PERTINENCY OF THE RECORDS DEMANDED

Watkins held as a requirement of due process that a witness before a congressional committee "is entitled to have knowledge of the subject to which the interrogation is deemed pertinent" (at 208-9), and that, "Unless the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body, upon objection of the witness on grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto. To be meaningful, the explanation must describe what the topic under inquiry is and the connective reasoning whereby the precise questions asked relate to it." (At 214-5.) This holding of the Court was summarized as follows by Mr. Justice Frankfurter in his concurring opinion (at 217):

> "The questions must be put with relevance and definiteness sufficient to enable the witness to know whether his refusal to answer may lead to conviction for criminal contempt and to enable both the trial and the appellate courts readily to determine whether the particular circumstances justify a finding of guilt.
>
> ". . . Prosecution for contempt of Congress presupposes an adequate opportunity for the defendant to have awareness of the pertinency of the information that he has denied to Congress. And the basis of such awareness must be contemporaneous with the witness' refusal to answer and not at the trial for it. Accordingly, the actual scope of the inquiry that the Committee was authorized to conduct and the relevance of the questions to that inquiry must be shown to have been luminous at

the time when asked and not left, at best, in cloudiness."

In the present case, there was no statement at the hearing as to the subject under inquiry or the specific legislative need for the names and addresses of the 35,000 members of petitioner's Union. Accordingly, the petitioner was not, as required by *Watkins,* informed either of the subject under inquiry or of the specific legislative need for the list of Union members.

On the remand, the prevailing opinion below avoided this problem by holding (R. 117):

> "Even if the resolution is vague, Flaxer's responses to questions demonstrated that he knew what the subject of the inquiry was. In response to the *subpoena* he produced the financial and various other records of his union and, without objecting, presented them to the Committee on the record. He thus indicated that he recognized the nature of the question under inquiry."

This has no semblance of logic. The fact that petitioner answered some of the Subcommittee's questions, as did Watkins, and produced the financial records merely shows that he was willing to provide this information whether or not the Subcommittee had a right to demand it. Acquiescing to some demands of the Subcommittee, especially with personal liberty at stake, could not demonstrate awareness of the question under inquiry in connection with those or other demands; nor did petitioner's production of some records in any way reveal knowledge of the subject under inquiry or the pertinency of the produced or withheld records. Nor, finally, would knowledge of the unidenti-

fied subject under inquiry, if it existed, supply knowledge of the pertinency of the records demanded.

As a second ground for holding that petitioner was not entitled to an explanation of the pertinency of the membership list, the prevailing opinion on the remand asserted that petitioner had not objected on the ground of lack of pertinency (R. 117-8). This is a misreading both of *Watkins*[1] and of the record.

Petitioner objected to the demand for the membership list as constituting a "wholesale invasion . . . of privacy" violative of the Fourth Amendment (R. 42). On two occasions he stated his belief that the membership list was being demanded for the purpose of compiling a blacklist to destroy the Union (R. 41, 49). He also stated that the demand was an "improper command" (R. 47), and he was cut off in the midst of an objection that the Subcommittee "was infringing here on an area which just crosses the boundaries of individual rights as well as trade union rights far beyond the contemplation of any—" by the chairman's state-

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[1] See *United States* v. *Peck*, 154 F. Supp. 603, 611: "The government contends, however, that even though a Committee is acting under a resolution which does not sufficiently define its authority, and even though a witness cannot determine the subject under inquiry, he has been afforded due process of law unless he objects to the questions asked on the specific grounds of 'pertinency.' This Court does not so narrowly construe *Watkins*, nor does it consider that such a construction is in any way consistent with the spirit of that ruling. Rather the court believes that Watkins requires strict compliance by the Congress with procedural requirements of definiteness of authority and subject matter whenever First Amendment rights of a witness are involved."

ment that, "Whatever your argument is," his objection would be overruled. (R. 50). The one-man chairman of the Subcommittee did not contradict the petitioner's assertions, nor did he state the subject of the inquiry or the pertinency of the records. Instead, he merely called attention to the fact that "for the present the records are to be delivered to the committee in executive session" (R. 49). Petitioner responded: "Sir, on that I don't see any good purpose that these records would serve, even if I were to produce them. I think they are wholly irrelevant, if you say they are not to be made public" (R. 50).

Thus petitioner's position was clear: If the records were to be made public, they would be used for an improper and impertinent purpose—blacklisting. If they were to be kept private, they would be "wholly irrelevant" even to the illegitimate purpose of blacklisting. Under any circumstances, the records could serve no valid purpose.

Petitioner, therefore, did challenge the pertinency and legislative purpose of the Subcommittee's demand. Since the Subcommittee did not then state the subject under inquiry and the manner in which the documents were pertinent thereto, *Watkins* requires that the conviction be reversed. Judge Prettyman's opinion on this point is simply blind to the facts of record. The opinion recognizes that petitioner objected that the documents would be irrelevant if they were not made public, from which it concludes that the petitioner's objection was to the documents being kept private! It fails to perceive that petitioner, by objecting that the Subcommittee wished to promulgate a public black-

list, was thereby objecting on grounds of lack of pertinency and legislative purpose if the lists were published. And it attaches no significance at all to petitioner's unequivocal statement that he did not see "any good purpose that these records would serve" if he were to produce them. Finally, it ignores entirely petitioner's repeated assertions that the demand was an unjustified invasion of privacy and a violation of Constitutional rights. These claims by themselves obviously include contentions of lack of pertinency, since their resolution involves balancing the need and usefulness (i.e., the pertinency) of the records against the interest in privacy, and since blacklisting is not a proper legislative or Subcommittee function (*Watkins*, at 187, 200). As the court said in *United States* v. *Peck*, *supra*, at 611:

> "In any event the Court finds that Peck did object to the lack of pertinency of the questions. Although he did not use the word 'pertinency', he informed the Subcommittee that he did not believe that it possessed the authority to ask the particular questions involved. In so doing he also specifically put the Subcommittee on notice that his complaint related to the invasion of his First Amendment rights. Justification for such an invasion may be found only in cases in which the Subcommittee's authority is clearly defined, a clear question under inquiry is established, and a question pertinent thereto is asked. Yet the Subcommittee made no effort to explain its asserted right to engage in such an invasion. Surely Peck's objection was sufficient, for where constitutional rights are involved, courts must liberally interpret objections of witnesses. They cannot impose a standard of technicality or insist upon a rigid verbal formula which serves only to defeat the

basic constitutional liberties they should strive to preserve."

It would have been too late to remedy these deficiencies at trial. It is illuminating, however, that a showing of relevancy and legislative need was not even belatedly made. At trial, the government presented no evidence at all on the subjects. Nor, as we have shown, did the purpose of the demand as conjectured by the court below in its original opinion constitute such a showing.[8] On the remand, the court below stated that petitioner knew the subject under inquiry, but the opinion significantly did not state what that was. The language of *Watkins* (at 214) aptly describes the present case: ". . . we remain unenlightened as to the subject to which the questions asked petitioner were pertinent. Certainly, if the point is that obscure after trial and appeal, it was not adequately revealed to petitioner when he had to decide at his peril whether or not to answer."

III. THE RESOLUTION ESTABLISHING THE SENATE SUBCOMMITTEE ON INTERNAL SECURITY IS TOO VAGUE TO SUPPORT A CONVICTION FOR CONTEMPT

Watkins held that a witness cannot be adjudged guilty of contempt for refusing to answer questions of a congressional investigating committee chartered by a vague resolution. *Watkins* emphasizes that this rule has special force where a committee inquiry infringes upon freedoms protected by the Bill of Rights. Applying this principle, *Watkins* held that the resolution establishing the House Committee on Un-American Activities was too broad and nebulous to support committee use of compulsory process.

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[8] The trial court found that the membership list was pertinent (R. 18, 89), but never stated the subject under inquiry.

The key passages in *Watkins* on the subject of vagueness are the following:

"An essential premise in this situation is that the House or Senate shall have instructed the committee members on what they are to do with the power delegated to them. It is the responsibility of the Congress, in the first instance, to insure that compulsory process is used only in furtherance of a legislative purpose. That requires that the instructions to an investigating committee spell out that group's jurisdiction and purpose with sufficient particularity." (At 201.)

"Combining the language of the resolution with the construction it has been given, it is evident that the preliminary control of the committee exercised by the House of Representatives is slight or nonexistent. No one could reasonably deduce from the charter the kind of investigation the Committee was directed to make." (At 204.)

"Yet it is impossible in this circumstance, with constitutional freedoms in jeopardy, to declare that the Committee has ranged beyond the area committed to it by its parent assembly because the boundaries are so nebulous." (At 205.)

"Protected freedoms should not be placed in danger in the absence of a clear determination by the House or the Senate that a particular inquiry is justified by a specific legislative need." (At 205.)

"An excessively broad charter, like that of the House Un-American Activities Committee, places the courts in an untenable position if they are to strike a balance between the public need for a particular interrogation and the right of citizens to carry on their affairs free from unnecessary governmental interference. It is impossible in such a situation to ascertain whether any legislative

purpose justifies the disclosures sought and, if so, the importance of that information to the Congress in furtherance of its legislative function. The reason no court can make this critical judgment is that the House of Representatives itself has never made it." (At 205-6.)

This first principle of *Watkins* was summarized in Justice Frankfurter's concurring opinion as follows:

"To turn to the immediate problem before us, the scope of inquiry that a committee is authorized to pursue must be defined with sufficiently unambiguous clarity to safeguard a witness from the hazards of vagueness in the enforcement of the criminal process against which the Due Process Clause protects." (At 217.)

The resolution here involved (*supra*, pp. 2-3) is in three clauses. In our view, all three are too vague to support use of compulsory process within the standards of *Watkins*. For present purposes, however, it is necessary to consider only the third, that authorizing the investigation of "the extent, nature and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence." This limited consideration is appropriate because (1) the vagueness of the third clause is most obvious, (2) the only subject of the inquiry supposed below (in Judge Miller's opinion) was justified under this clause, and (3) in fact it is on this record impossible to tell which clause the Subcommit-

tee was acting under, if any, from which it follows that the subpoena is vulnerable if any one of the authorizations to which it might relate is insufficient to support it.

The key term of the third clause is "subversive activities." This is obviously no more susceptible to intelligible definition than "subversive and un-American propaganda," which *Watkins* held to be a fatally vague charter for the Un-American Activities Committee. In *Watkins*, moreover, the Court expressly stated (at 214): "The Chairman then announced that the Subcommittee was investigating 'subversion and subversive propaganda.' This is a subject at least as broad and indefinite as the authorizing resolution of the Committee, if not more so."

The conclusive demonstration of the vagueness of the authorizing resolution of the Internal Security Subcommittee appears in Judge Youngdahl's opinion in *United States* v. *Peck, supra*, at 608-10, as follows:

> "It seems manifest that the vices to be found in the House Un-American Activities Committee's authorizing resolution are equally present in the charter of the Senate Internal Security Subcommittee. The Senate resolution is composed of three sections, two of which relate to the study of internal security laws. The third section, however, purports to grant the authority to investigate 'subversive activities'. The Supreme Court has clearly indicated that such a grant of authority must fail for want of definiteness. In *Watkins* the Court noted that the Chairman of the Un-American Activities Committee had announced that the scope of the investigation was 'subversion and subversive propaganda'. The Court then said, 'This is a subject at least as broad and indefinite as the resolution of the Committee, if not more so.'

"In its resolution, the Senate did not undertake the troublesome task of defining 'subversive activities'. . . . . no indication is given as to what else is deemed 'subversive', nor is the Court aware of a satisfactory definition. What may be a fit subject for investigation one day may be tomorrow's sacred cow. What is the height of orthodoxy today may be viewed as 'un-American' tomorrow. Nor is there any individual who can be certain that he is not considered 'subversive' by some of his fellow citizens. Who is to say, for example, whether one who is openly dedicated to depriving his neighbors of their 14th Amendment rights under the Federal Constitution is a 'subversive'? The dangers of classifying certain forms of belief or political activity as 'subversive' are all too apparent from the recent history of this country. It is too easy for one segment of public opinion to smear with that label those who hold opinions which are unpopular. Such labeling by means of legislative investigations constitutes a drastic form of Government sanction. When that labeling is done in the manner utilized by the Senate Internal Security Subcommittee it becomes intolerable. Democracy deals with unpopular views by offering better ideas and programs, not by outlawing those views or penalizing their adherents.

"The resolution cannot be saved by reference to the first two sections, which concern investigations of the Internal Security Act and laws relating to espionage and sabotage. Nor can it be saved by construing the third section to include only such 'subversive activities' as are comprehended within the 'including but not limited to' clause. For the history of the Subcommittee's investigations shows that it conceived its mission to be the broad task of rooting out 'subversives' or Communists wherever it found them. The Subcommittee made no effort to distinguish among the several sections of its authorizing resolution in conducting its investigations, and thus the resolution must be evaluated

as a whole. The Court must view it in the light of the Subcommittee's understanding of its mandate—to root out subversion. A comparison of the Subcommittee's reports with those of the Un-American Activities Committee demonstrates an identity of understanding as to the sweeping mission to be accomplished. Each conceived of itself as the nation's watchdog. Each thought that it was capable of determining what was 'Un-American', what was 'subversive'. Each failed to distinguish between innocent associations with groups which were legitimate at the time of membership and knowing adherence to a criminal conspiracy. Neither restricted its inquiries to acts of espionage, sabotage, or infiltration—whatever the latter means—by persons dedicated to overthrowing the government by force. The Supreme Court has held that such a manifestation of authority renders an authorizing resolution, so questionable in its terms, vague or defective."

IV. PETITIONER WAS ENTITLED TO A JUDGMENT OF ACQUITTAL BECAUSE HIS OBJECTIONS TO THE VALIDITY OF THE SUBPOENA WERE NOT OVERRULED BY A QUORUM OF THE SUBCOMMITTEE

Quinn v. *United States*, 349 U.S. 155, and *Bart* v. *United States*, 349 U.S. 219, established that a witness who has objected to a committee's demands may not be convicted of contempt unless his objections have been overruled by the committee. In the present case, petitioner's objections to producing the membership list of the Union were overruled by a single member of the seven-man Subcommittee on Internal Security (R. 34), who was the only Senator present at the hearing. This Senator also overruled petitioner's objection to the absence of a quorum (R. 38-9).

Under the Senate Rules and the Subcommittee's enabling resolution, one Senator was not a quorum for

the purpose of ruling on petitioner's objections. Therefore, petitioner's objections were never overruled by an authorized tribunal, and he cannot be held guilty of contempt.

Section 2 of Senate Resolution 366 (*supra*, p. 3), which is the charter of the Subcommittee, provides that a majority of the members of the Subcommittee "shall constitute a quorum for the transaction of business, except that a lesser number, to be fixed by the committee, or by such subcommittee, shall constitute a quorum for the purpose of administering oaths and taking sworn testimony." Senate Rule XXV(3) (*supra*, pp. 3-4) provides that each standing committee and subcommittee "is authorized to fix the number of its members (but not less than one third of its entire membership) who shall constitute a quorum thereof for the transaction of such business as may be considered by said committee"; also each standing committee and subcommittee "is authorized to fix a lesser number than one third of its entire membership who shall constitute a quorum thereof for the purpose of taking sworn testimony." In January 1951, the Subcommittee took advantage of the permissive provisions for testimonial quorums by passing a resolution that one member of the Subcommittee would constitute a quorum for the purpose of taking testimony (R. 34).

Under the Senate Rules and Senate Resolution 366, therefore, the authority of Senator Watkins, who presided at the hearing as the single Senator present, was limited to taking sworn testimony. The transaction of any other business required a majority of the seven-man Subcommittee.

It is clear, we submit, that Senator Watkins was not a quorum for the purpose of ruling on petitioner's ob-

jections to the subpoena, since such a ruling was not the taking of sworn testimony and constituted the transaction of other business, for which one Senator could not be a quorum.

The authorization to take "sworn testimony" by its terms precludes authority to deal with documents. The word "testimony" means, when accurately defined, *oral* statements under oath, and does not include documents. Thus Black's *Law Dictionary* (3rd ed., 1933) defines "testimony" as follows: "Evidence given by a competent witness, under oath or affirmation; as distinguished from evidence derived from writings, and other sources" (citing numerous cases, including *Edelstein* v. *United States,* 149 F. 636, 640). To like effect: Ballentine, *Law Dictionary,* (3rd ed., 1948); Bouvier's *Law Dictionary* (Rawle's 3rd Rev., 1914).

Accordingly, "testimony" when used in statutes is generally construed to exclude documents, unless there is compelling reason to the contrary to effectuate the legislative intent or the statutory purpose. E.g., *Brett* v. *Dean,* 239 Ala. 675, 196 So. 881; *Stern* v. *Superior Court,* 78 Cal. App. 2d 9, 177 P. 2d 308, 310; *Re Seigle's Estate,* 264 N.Y. App. Div. 76, 34 N.Y. Supp. 2d 489, 491; *Barley* v. *Dunn,* 85 Ind. 338, 339; *Weeks* v. *Bailey,* 33 N.M. 193, 196, 263 Pac. 29, 30.

The reference in the Resolution and Senate Rule is not to "testimony" alone, but to "sworn testimony." This clearly must mean oral evidence. Surely the documents which appellant was subpoenaed to produce were not, and were not supposed to be, sworn papers.

The text of the Resolution and Rule, therefore, does not authorize one Senator even to *receive* documentary evidence, much less to rule on objections to their pro-

duction. And there are good reasons, even aside from the legislative history of Senate Resolution 180, to which we later refer, why the text should not be expanded beyond its plain meaning.

In the first place, the provision authorizing a one-man quorum is stated as an exception to the general rule of what constitutes a quorum. It is a settled principle that exceptions will be construed strictly, since otherwise the exception can nullify the general rule. See Mr. Justice Holmes' statement in *Schlemmer* v. *Buffalo, R. & P.R. Co.*, 205 U.S. 1, 10; also *Piedmont & Northern Ry. Co.* v. *I.C.C.*, 286 U.S. 299, 311-2; *United States* v. *Dickson*, 15 Pet. 141, 165; *United States* v. *Scharton*, 286 U.S. 518, 521-2. Since the Internal Security Subcommittee is strictly an investigating committee (Sen. Res. 366, 81st Cong., 2d Sess.), an expansion of the exception would really swallow the rule.

Secondly, a strict construction of the exception does not frustrate the exercise of Congressional power. For the documents can always be received, and objections to their production ruled on, by a genuine quorum.

Thirdly, in the light of the vast public criticism of one-man subcommittees, it would be unreasonable to assume that the Senate intended its authorization of one-man subcommittees to be extended beyond its precise terms.

Fourthly, the fact that the Senate was willing to have one Senator take testimony does not by any means imply that the Senate was willing to have one Senator rule on objections to the production of documents. Documents can have value only insofar as they represent evidence not obtainable by oral testimony. More-

over control over papers and records is a touchy matter. The documents may not be the witness' property and their production may invade the privacy of many people. Such was precisely the situation in this case. And demands for the production of documents, unlike demands for oral testimony, can raise Fourth Amendment problems and can seriously interfere with the business of an organization of many persons.

Finally, Senator Watkins could have the power to rule on petitioner's objections only if he had the power to rule both ways. It cannot be suggested that he had authority to overrule the objections, but did not have authority to grant them. Otherwise, indeed, there would be no force in the principle that a witness is entitled to have his objections ruled on by the tribunal.

It is clear, however, that Senator Watkins did not have the authority to grant petitioner's objections. If he had done so, he would have vacated the subpoena pro tanto. The subpoena, however, was a Committee action, issued not by Senator Watkins, but by the Committee chairman (R. 53, 63), who was authorized to act for the Committee in issuing the subpoena. Sen. Res. 366, 81st Cong., 2d Sess. Vacation of the subpoena, in whole or part, would clearly not be the 'taking of testimony," but the transaction of other business. Nor should a single Senator be able to eliminate by his own ruling an action taken by the chairman on behalf of the Committee as a whole. Such a step obviously required a full quorum of the Committee, and not merely a quorum for testimonial purposes.

Our analysis is corroborated by the legislative history of the revision of Senate Rule XXV(3), which shows that the exception for a testimonial quorum of

less than one-third was adopted for a special, limited purpose which has no application under the present circumstances, and that it was not intended to apply beyond its precise and narrow terms.

Prior to the adoption of Senate Resolution 180, 81st Cong., 2d Sess., the Senate rule on quorum, contained in subsection (3) of rule XXV of the Standing Rules of the Senate, did not contain the exception for testimonial quorums, but merely provided as follows:

> "(3) Each standing committee is authorized to fix the number of its members (but not less than one-third of its entire membership) who shall constitute a quorum thereof for the transaction of such business as may be considered by said Committee, subject to the provisions of section 133(d) of the Legislative Reorganization Act of 1946." (Quoted in Sen. Rep. 1208, 81st Cong., 2d Sess., p. 1).

Senate Resolution 180, which amended this provision to its present text so as to permit smaller testimonial quorums, was reported favorably by the Senate Committee on Rules and Administration. The report of that Committee (Sen. Rep. 1208, 81st Cong., 2d Sess.) fully explains the purpose of the change made by Resolution 180, as follows (p. 1, emphasis supplied):

> "In *Christoffel* v. *United States*, ((1949) 338 U.S. 84), the Supreme Court invalidated the practice or custom of presuming a quorum of a committee to be present once it had been established, and until a point of 'no quorum' was made, insofar as the existence of a quorum is necessary to establish a competent tribunal for taking sworn testimony.
>
> "Adoption of Senate Resolution 180 is intended to meet the problems raised by the Supreme

Court's decision, by authorizing each Senate committee and subcommittee hereafter to fix the number of its members which shall constitute a quorum *for the purpose of taking sworn testimony. The resolution does not otherwise change the existing requirements pertaining to committee quorums contained in the Senate Rules or in the Legislative Reorganization Act of 1946.*"

When the Resolution reached the Senate floor, Senator Lucas asked for an explanation of the bill. Senator Hayden, speaking for the Committee on Rules and Administration, replied as follows (96 Cong. Rec. 1284; emphasis supplied):

"Mr. Hayden (For Committee on Rules and Administration). Mr. President, this resolution is designed to take care of the question of a quorum being present in committees when sworn testimony is to be taken and perjury may be committed. *It is to prevent perjury.* The committee believes it has met the problem in the proper way. The Senator will remember there is presumed to be a quorum present. That had been the usual rule, until the Supreme Court decided otherwise. Now, for the purpose of taking sworn testimony, any committee can determine the size of the committee at a hearing, and, when it is so determined, may also determine the number required to be present. Then, if a witness gives false testimony, under such circumstances, he is guilty of perjury."

Then, replying to Senator Byrd's question as to whether the resolution had any bearing on the quorum necessary to report a bill, Senator Hayden stated (*ibid.*; emphasis supplied):

"No. The resolution merely has to do with the procedure before committees *in order to cover the question of perjured testimony.*"

It is clear, therefore, that the provision for one-man subcommittees to take sworn testimony was a response to the *Christoffel* decision; that it was intended to prevent a witness from "getting away with" perjury; that it was not designed to otherwise enlarge the authority of a number less than the usual quorum; and that, in the language of the Senate Report, quoted above, except for reducing the quorum to take sworn testimony, it "does not otherwise change the existing requirements pertaining to committee quorums." It follows that the Resolution was not intended to go beyond the perjury problem so as to authorize a one-man subcommittee to arrogate to himself the power to rule on objections to the production of documents, a matter which has nothing to do with the perjury problem which the Resolution was intended to meet.

The objections raised by the petitioner to the production of the membership list of his Union were clearly not frivolous. The issue was an important one and his views are shared by other union leaders.[9] As peti-

---

[9] See, *e.g.*, the May 1952 issue of the *Catering Industry Employee*, official journal of the Hotel and Restaurant Employees and Bartenders International Union,

> "The issue is this: do unions have the right, as the courts have repeatedly held to hold their membership lists in privacy? I think they do. I hope others will join me in speaking out in defense of that right before it is too late."

The July 1952 issue of *The Carpenter*, official journal of the United Brotherhood of Carpenters and Joiners, stated in an editorial on the present case:

> "The right of privacy is something it took organized labor generations to achieve. It is something unions must maintain if the blacklist, labor spying, and all the evils of fifty years ago are not to be brought back."

Similarly a statement of policy adopted unanimously by the International Executive Board of United Packing House Workers of

tioner stated when he appeared before the Subcommittee (R. 41-42), it was then unlawful for private employers to inquire into the union membership of their employees. See 2 C.C.H., *Labor Law Reporter*, 2068 *et seq.* As we have shown above, there is no evidence at all as to what value or use these membership lists would have been to the Subcommittee in any event. It is perfectly possible that if the Subcommittee had fully considered petitioner's objections as against the relative lack of value of the membership lists, the Subcommittee might have reconsidered its demand or might have modified that demand in some way so that the issue of contempt would have been avoided. As Chief Judge Edgerton pointed out in his dissent, a full quorum "might have accepted appellant's view that the subpoena was invalid. Even if it had not accepted that view, it might have concluded that number of union members, not their names, were all that the committee needed, and might therefore as a matter of policy have withdrawn the demand for names." (R. 113).[10]

This Court "would have to be that 'blind' Court . . . that does not see what all others can see and understand not to know that there is wide concern, both in and out of Congress over some aspects of the exercise of the Congressional power of investigation." *United States*

America, CIO, at a meeting held April 22-25, 1953, stated with respect to this case as follows:

> ". . . in his recent contempt conviction for refusing to turn his union membership lists over to a Congressional investigating committee Abram Flaxer of the United Public Workers was supporting a principle on which any trade union leader would face jail rather than betray his trust."

[10] Judge Edgerton's reasoning is reinforced by the fact that the contents of the subpoena had not been considered by a full quorum of the Subcommittee prior to its issuance. See *supra*, p. 6.

v. *Rumely, supra,* at 44. Many of the abuses of the investigative power have been laid to the use of one-man subcommittees. See Barth, *Government by Investigation, supra* at pp. 203-4. And, as Judge Fahy's opinion after the remand points out (R. 118-9), *Watkins* supports the principle that the delegation of power to one-man subcommittees must be clear and precise before a witness can be required to obey a command on pain of contempt.

Here a single Senator insisted on a demand which had never before been made by a body of the Congress and which affected 35,000 individuals, and this without any statement of the purpose of the subpoena by the Subcommittee itself. When in addition to the natural concern that would be aroused by such a practice, it appears clear that the practice itself is in violation of the Senate Rules and of the rules of the Subcommittee, a defendant who is being prosecuted for contempt in violation of such rules must be granted a judgment of acquittal.

V. THE PETITIONER WAS NOT ORDERED TO PRODUCE THE RECORDS AT THE HEARING ON OCTOBER 5TH

At the hearing on October 5, 1951 there was considerable discussion between petitioner and Senator Watkins concerning the portion of the subpoena which demanded the Union's membership list. Petitioner after objecting to the validity of the subpoena, was directed by the sole Senator present to produce the list. He continued to object, asking for reconsideration of this ruling. The discussion on this matter was concluded with this final exchange:

> Mr. Arens: Will you produce it pursuant to the order of the chairman of this session within 10 days from today?

Mr. Flaxer: I will have to take that under consideration.

Senator Watkins: That is the order, and of course, we will have to take whatever steps are necessary if at the end of the time you have not produced them. (R. 50)

The majority below held that petitioner was guilty of contempt on October 5, the date of the hearing,[11] thus making irrelevant Senator Watkins' extension of the subpoena date for production (R. 98-102). Judges Edgerton and Bazelon held that under this Court's decision in *Quinn* v. *United States, supra,* it was necessary to examine the entire proceedings, and that the issue of direction must be resolved on the basis of the final ruling made on petitioner's objections, and not on the basis of an intermediate ruling. Their dissent reasoned as follows (R. 112-3):

"In *Quinn* v. *United States,* 349 U.S. 155, 165-166, the Court said: 'Clearly not every refusal to answer a question propounded by a congressional committee subjects a witness to prosecution under § 192. Thus if he raises an objection to a certain question—for example, lack of pertinency or the privilege against self-incrimination—the committee may sustain the objection and abandon the question, even though the objection might actually be without merit. In such an instance, the witness's refusal to answer is not contumacious, for there is lacking the requisite criminal intent. . . . In short, unless the witness is clearly apprised that the committee demands his answer notwithstanding his objections, there can be no conviction under § 192 for refusal to answer that question.'

[11] The majority agreed with the petitioner's contention that under the indictment and the case as tried, the petitioner was either guilty of contempt on October 5th or not at all, and that the issue of the production or non-production of the list of names after October 5 was not in the case (R. 98-102, and see *supra,* p. 11).

The present appellant was clearly apprised that notwithstanding his objections, the Chairman demanded that he produce the records *within ten days from October 5.* He was not apprised that, notwithstanding his objections, he must produce the records on October 5. On the contrary, the Chairman made it clear that he need not produce them on that date and production within 10 days from that date would suffice. It follows that here, as in the *Quinn* case, the District Court should have directed a judgment of acquittal."

The minority view is clearly the only tenable one under the *Quinn* doctrine. A witness is not "clearly apprised that the committee demands his answer notwithstanding his objections", on the basis of a direction made in the course of a colloquy which is altered at the end of further discussion. A witness can only reasonably conclude that he should be guided by the last words of the committee and not by its earlier statements. Indeed, this Court in *Quinn* (at 166, ftn. 34) cited with approval the decision and opinion of the District Court in *United States* v. *Kamp,* 102 F. Supp. 757, in which the defendant was acquitted of contempt on the basis of a colloquy between the defendant and the committee substantially identical to that which occurred here.

CONCLUSION

The judgment below should be reversed with directions for the entry of a judgment of acquittal.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 60

ABRAM FLAXER, *Petitioner,*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. THE FAILURE TO SHOW THE SUBJECT UNDER INQUIRY, PERTINENCY, OR LEGISLATIVE PURPOSE

A. The Subject Under Inquiry

The government contends (Br. 52) that the subject under inquiry before the Subcommittee was "the extent of the Communist Party's infiltration into the union." It is unable, however, to document this assertion by reference to any thing specific said at the Subcommittee hearing or to any evidence at the trial. Instead it relies on "the entire tenor of the questions which the Subcommittee asked petitioner . . ., particularly when viewed in the light of the back-

ground information concerning petitioner and his union which the committee had received prior to subpœnaing him . . ." (Br. 52).

The "entire tenor" of questions cannot, we submit, ever demonstrate a subject under inquiry with the "undisputable clarity" that is required to support a contempt conviction. *Sacher* v. *United States*, 356 U.S. 576. In any event, the hearing at which petitioner appeared had not even a semblance of the "tenor" claimed by the government. At the hearing, the only questions asked about the Union were whether it possessed the information called for by the subpoena, the number of its members, where they were employed, whether the Union had bargaining rights, whether its officers had to sign non-Communist affidavits, how many locals it had in the Veterans Administration, and who were its national officers (R. 42-49). These neutral, random questions do not by any stretch of the imagination convey the "tenor" claimed by the government. Nor is the situation improved by the responses made by the Subcommittee to petitioner's protests that the membership list could serve no legitimate purpose and would be used for blacklisting. These responses were merely a continued, unexplained insistence on production of the list plus the unilluminating observation (R. 48) that the government has a right to know which of its employees belong to a union.

B. Pertinency

Even accepting the government's conjecture of the subject under inquiry, there remains unexplained how the Union's membership list was pertinent to that subject. As we pointed out in our principal brief (pp. 28-29), the theory of the court below that the

Subcommittee wished to check the Union's membership list against "a list of subversives" was an unsupported improvisation. The government, while embracing the court's theory, itself acknowledges that nothing was said either at the hearing or the trial to support it (or for that matter any other theory of pertinency). "It is sufficient," says the government (Br. 53), "if, as the court below indicated, this could reasonably have been the committee's purpose." It is not surprising that the government cites no authority for this view that a "reasonable" speculation can take the place of a showing of actual pertinency. The unbroken rule of this Court has always been that actual pertinency is an essential element of the offense and must be pleaded and proved. See our principal Brief, pp. 19-20.

The government's argument confuses two situations. Even if it were true, for some reason or other, that "it is unimportant that Senator Watkins" did not explain the pertinency of the demand at the Subcommittee hearing (Br. 53), nevertheless, pertinency would still have to be proved at the trial before petitioner could be rightfully convicted. Since it is not even claimed that actual pertinency was proved, it is clear that the conviction can not stand.

C. Legislative Purpose

The government suggests three possible legislative purposes for the Subcommittee's inquiry: (1) The Subcommittee might have been interested in "remedial legislation designed to oust the Communists from positions of control" in the Union (Br. 54); (2) The Subcommittee might have been trying to determine if the Union was a "Communist-front organization"

as defined by the Internal Security Act of 1950 (Br. 42); (3) The Subcommittee might have been trying to do something relevant to the constitutional requirement "that the United States guarantee to every State a republican form of government" (Br. 55).

The first objection to these suggestions is that they are all might-have-beens. There is simply nothing in the record to indicate what the Subcommittee actually wanted the membership list for, excepting the possible inference to be drawn from the Subcommittee's failure to deny the petitioner's protestations that it wanted the list for the non-legislative purpose of blacklisting.[1] The government's hypothesis of three legislative purposes, based on a conjectured subject under inquiry, does not even rise to the level of a "mere semblance of legislative purpose" which "would not justify an inquiry in the face of the Bill of Rights." *Watkins* at 198. The far-fetched nature of the government's reasoning is shown by its reliance, as evidence of a legislative purpose, upon the enactment by Congress in 1954, some three years after the hearing, of legislation denying rights under the National Labor Relations Act to labor organizations found to be "Communist infiltrated" (Br. 50-51). The government adds parenthetically, "The fact that the U.P.W.A. is not covered by the National Labor Relations Act

[1] The government argues (Br. 53) that petitioner's accusation that the list was desired for blacklisting purposes was refuted by the "entire tenor of the Senator's statements". But all that Senator Watkins said in response to the charge was that the Subcommittee wanted the list, and, in the Senator's view, was entitled to get it. This "tenor", if anything, was a confirmation of petitioner's charge rather than a refutation. Significantly, the government points to no specific statement of the Senator which can support its contention even by implication.

does not detract from the fact that the Subcommittee's inquiry into labor unions generally had a valid legislative purpose." But there is no issue here as to the validity of an inquiry into labor unions generally, and the fact that the Subcommittee may have had legislative purposes on other occasions, does not serve to establish a valid legislative purpose at the hearing at which petitioner appeared.

Furthermore, even if the Subcommittee had the supposed purposes, there is no clue—and it is hard to imagine—as to how the list of Union members would serve the purposes. The assumption of the court below that the Subcommittee had a "list of subversives" against which it desired to check the Union's membership roll is as unsupported as it is constitutionally objectionable.[2] Even assuming that the Subcommittee had some kind of a "list," the government fails to make a showing that a checking of the names of Union members against it would substantially forward the conjectured legislative purposes. Clearly, there is no more substantial and legitimate relation between the names of the Union members and the conjectured legislative purposes than there was between the names of the NAACP members

[2] The government takes umbrage at our view (our principal Brief, 29) that the court below assumed the possession by the Subcommittee of a "master list" of subversives. It responds (Br. 53) that the Subcommittee did not necessarily have a "master list" but "certainly had" a collection of names of persons "who, there were at least grounds for believing, were members of the Communist Party," and that it was against this list that the Subcommittee intended to check names. But this does not make the purpose less illegitimate. It shows only that the list would be of very little utility even for this illegitimate purpose.

and the alleged needs of Alabama in *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449.[8]

Finally, it is interesting that at least one of the three legislative purposes conjectured by the government is improper. The function of determining what organizations are "Communist-front organizations" is, under the Internal Security Act, entrusted to the Subversive Activities Control Board after an adversary administrative hearing, subject to court review. The Subcommittee obviously did not and could not have the authority to usurp this role by making such determinations upon its own kind of ex parte hearings. As this Court stated in *Quinn* v. *United States*, 349 U.S. 155, 161: "[T]he power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary."

II. THE FAILURE TO INFORM PETITIONER OF THE SUBJECT UNDER INQUIRY AND OF THE PERTINENCY OF THE DEMAND

The government does not dispute that the Subcommittee never informed petitioner of the subject under inquiry, and it concedes (Br. 68-69) that the Subcommittee never explained the pertinency of the demanded records to the subject, whatever it was. It argues, however, that the requirement of *Watkins* that a witness be informed of subject and pertinency does not apply because (1) petitioner's objections did not amount to "an adequate raising of the issue of

[8] Unquestionably the rights of the Union members against compulsory disclosure of their affiliation is entitled to the same constitutional protection as was accorded the NAACP membership. See Robison, *Protection of Associations from Compulsory Disclosure of Membership*, 58 Col. L. Rev. 614, 635-637, 647-649.

lack of pertinency" (Br. 74); (2) pertinency, even though not expressly stated, had "been made to appear with undisputable clarity . . . from the totality of the attendant circumstances, including but not at all limited to the terms of the committee's authorizing resolution" (Br. 75); and (3) "petitioner was well aware of both" the subject of inquiry and the pertinency thereto of the demand (Br. 75).

At to the second of these contentions we need add nothing further to our demonstration that the subject of inquiry and the pertinency of the demand were wholly undefined not only at the Subcommittee hearing, but also at the trial.

The first contention—inadequacy of the form of objection—was dealt with in our principal Brief (pp. 33-38) in terms of the holding below. An additional comment is warranted, however, by the government's curious argument that the petitioner's objection on Fourth Amendment grounds assumed pertinency (Br. 71-72). The fact is that the Fourth Amendment is the precise constitutional provision which justifies a witness in refusing to produce documents in response to a subpoena duces tecum on the ground that the subpoena calls for irrelevant documents and is therefore an unlawful invasion of privacy. *Federal Trade Commission* v. *American Tobacco Company*, 264 U.S. 298. Contrary to the government's position (Br. 74), a witness before a Congressional committee need not state his objections with the exactitude and precision to which a lawyer may be held in a judicial trial *Quinn* v. *United States*, 349 U.S. 155. Yet even if petitioner had been obliged to state his objection in technical terms, he did so when he cited the Fourth Amendment.

The government's third argument makes an assertion of fact, that petitioner knew the subject under inquiry and the pertinency of the demand. This assertion, however, is not supported by any reference to evidence,[4] but merely quotes Judge Prettyman's statement to the same effect (Br. 75). Our principal Brief pointed out (pp. 34-35) that Judge Prettyman's comment is unsupported by either evidence or logic. The government's failure to respond to our observations makes no contribution to a resolution of the issue, which is not what Judge Prettyman said, but whether he was right.

III. PETITIONER'S STANDING TO RAISE ISSUES RELATING TO EVENTS AT THE HEARING

The government argues (Br. 80-84) that petitioner has no standing to complain that the Subcommittee failed to apprise him of the subject under inquiry and the pertinency of its demand, did not have a quorum, and did not order him to produce the documents on the day at issue. This argument rests on the fact that petitioner had not compiled the membership list prior to the hearing, which proves, says the government, that petitioner "had made up his mind not to comply with this portion of the subpœna under any circumstances" (Br. 82). Accordingly, says the government, petitioner may not rely upon the events at the hearing as a defense to the charge of contempt since these were not the "true basis" of petitioner's refusal (Br. 82).

[4] The only evidence of petitioner's knowledge of the Subcommittee's purpose appears in his repeated protests that the list was desired for black-listing purposes. Since the government vehemently repudiates this charge (Br. 53), we can assume that it does not rely upon what petitioner said at the hearing as any evidence of his knowledge.

The inference which the government seeks to draw from petitioner's failure to compile the list in advance is far-fetched and unwarranted. This is not a case like *Bryan* v. *United States,* 339 U.S. 323, where the witness argued that it was necessary for a quorum to be present to witness a refusal to comply with a subpœna. Nor can petitioner's position be properly analogized to the cases cited by the government (Br. 83-84) of witnesses who declared in advance that they would not comply with the subpœna at any time no matter what the ruling authority declared.

Petitioner's position was not one of flat defiance no matter what. His failure to compile the list in advance merely went to the precise due date of a demand which on its face appeared to be onerous and extravagant and to which he had no effective opportunity to object before the due date. Petitioner was in a position to produce the list within a reasonable time if the events at the hearing called for production. It was unreasonable to expect the petitioner to go to the expense and trouble of compiling a list of 35,000 names and addresses prior to presenting his objections to the Subcommittee. On the other hand, it was quite reasonable for petitioner to expect that the Subcommittee would withdraw its unprecedented and startling demand once it heard petitioner's objections. Nor was it unreasonable for petitioner to anticipate that the Subcommittee would have a quorum to consider his objections, to apprise him of the subject under inquiry and of the pertinency of the list, and then, if it still insisted on production, to allow time (as in fact it did) for its compilation after the hearing. Implicit in the government's position is the premise that no one could possibly assume that the Subcom-

mittee might act in a reasonable and responsible manner.

The fact is, however, that it is not appropriate to make petitioner's liberty depend upon speculations as to what he would have done if the Subcommittee had acted otherwise than it did. The key question is not whether petitioner had the list ready for production, but whether he had a legal duty to produce it. Under *Watkins* and *Quinn*, once he objected to the absence of a quorum and to the propriety and pertinency of the demand, he had no duty to produce unless and until a quorum overruled his objections and the Subcommittee explained pertinency. The Subcommittee, however, did none of these things and it is futile to conjecture what the petitioner might have done if those requirements had been met.[5] This Court did not engage in such conjecture as to how the witnesses in *Quinn* or *Watkins* might have behaved if the committees involved had met the procedural requirements of those cases. See also *Bart* v. *United States*, 349 U.S. 219.

Nor is there any merit to the government's position that petitioner cannot avail himself of the events at the hearing because these did not constitute the "true basis" for his refusal. A witness, in the first instance, must always base his objections on some grounds other than a failure to rule on objections or to inform of pertinency, such as that the question or demand is improper, or impertinent. Logically, it is impossible for him to base his refusal on the ground that the

[5] If one must speculate, it is quite possible, as noted by Chief Judge Edgerton below (R. 113), that a quorum might have granted petitioner's request and withdrawn the demand for the membership list.

committee has not overruled his objection or explained the pertinency of the question. Unless the witness has a valid or at least an arguable objection to producing records or answering questions, the situations in *Quinn* and *Watkins* cannot arise. Neither in *Quinn* nor *Watkins* were the events at the hearing the "true basis" for the witness' refusal to answer questions. In *Quinn*, the basis was the First and Fifth Amendments, and in *Watkins*, the lack of pertinency of the questions. Yet in both cases, the Court held that the conduct of the committee in failing properly to consider these objections constituted a defense to the charge of contempt. The present case is indistinguishable.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1958

ABRAM FLAXER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 965

ABRAM FLAXER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The two prevailing (Pet. App. C, pp. 1–3, 3) and two dissenting opinions (*id.*, pp. 3–5, 5) in the Court of Appeals, sitting *en banc*, which were rendered following this Court's remand of the case (354 U. S. 929) for consideration in the light of *Watkins* v. *United States*, 354 U. S. 178, have not yet been reported. The original majority (Pet. App. B, pp. 1–15) and two dissenting opinions (*id.*, pp. 15–19, 19) in the Court of Appeals, likewise sitting *en banc*, are reported at 235 F. 2d 821.[1]

[1] Judges Bastian and Burger took no part in the consideration or decision of the case on either occasion. In both instances, the court divided 4 to 3 in favor of affirming the conviction, the same judges making up the majority and mi-

JURISDICTION

The judgment of the Court of Appeals was entered on April 3, 1958 (Pet. App. A, pp. 1–2). The petition for a writ of certiorari was filed on April 29, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED[2]

1. Whether the pertinence of the information sought by the subpoena *duces tecum*—the membership list of the United Public Workers of America, showing which members were employed by the Federal Government and which by state and local governments—was or should have been sufficiently clear to petitioner (who failed to raise any issue as to pertinency), so as to sustain his conviction under 2 U. S. C. 192 for refusal to produce that list.

2. Whether Senate Resolution 366, 81st Congress, which created the Internal Security Subcommittee and defines its powers, is invalid on its face.

3. Whether a resolution authorizing a subcommittee consisting of a single Senator to "administer

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nority on each occasion. The majority originally wrote a single opinion, but on the remand Judge Prettyman wrote an opinion which was concurred in by Judges Miller and Danaher, and Judge Washington indicated in a brief concurring opinion that he "concur[red] in the result." See *infra*, pp. 3–5.

[2] We omit from the "Questions Presented" issues which were urged in petitioner's prior petition for certiorari (No. 462, Oct. Term, 1956) and are repeated in the present petition, but with respect to which, because they are not at all affected by the decision in *Watkins* v. *United States*, 354 U. S. 178, we rest on the replies set forth in our earlier brief in opposition. See *infra*, p. 22, including fn. 20.

oaths" and "take sworn testimony" includes in its grant of authority the power to entertain and pass upon a witness' objections to producing subpoenaed documents.

STATEMENT

Petitioner, on November 20, 1952, was charged in a two-count indictment (R. 2–3), returned in the United States District Court for the District of Columbia, with having willfully refused, in violation of Revised Statutes, Section 102, as amended (2 U. S. C. 192), to produce, pursuant to a subpoena *duces tecum* issued by the Subcommittee on Internal Security of the Senate Committee on the Judiciary, records of the United Public Workers of America showing the names and addresses of members of that organization who were employed by the United States Government (count 1) and by any state, county, or municipal government in the United States (count 2). Found guilty by a jury on both counts, petitioner was sentenced generally to two months' imprisonment and to pay a fine of $1,000 (R. 20–21). On appeal to the Court of Appeals for the District of Columbia Circuit, the judgment of conviction was, on June 21, 1956, affirmed by that court, sitting *en banc,* by a divided vote, Judges Bastian and Burger taking no part in the consideration or decision of the case (Pet. App. B, pp. 1–19; 235 F. 2d 821). The majority opinion was written by Judge Miller and concurred in by Judges Prettyman, Washington, and Danaher (*id.,* pp. 1–15). Chief Judge Edgerton and Judge Bazelon

joined in one dissenting opinion (*id.*, pp. 15–19) and Judge Fahy dissented in a separate dissenting opinion (*id.*, p. 19).

Thereafter, this Court, on June 24, 1957, on petition for a writ of certiorari to review this judgment, granted the petition, vacated the judgment of affirmance, and remanded the case to the Court of Appeals "for consideration in light of *Watkins* v. *United States*, 354 U. S. 178" (354 U. S. 929). The case was thereafter rebriefed and reargued in the Court of Appeals, which again sat *en banc*. On April 3, 1958, that court again affirmed the judgment of conviction (Pet. App. A, pp. 1–2), with Judges Bastian and Burger taking no part. Judge Prettyman wrote an opinion in which Judges Miller and Danaher joined (Pet. App. C, pp. 1–3). Judge Washington indicated in a brief concurring opinion that he "concur[red] in the result, finding no impediment in *Watkins*, or other controlling authority, to affirmance of the conviction" (*id.*, p. 3). Judge Fahy wrote a dissenting opinion in which Chief Judge Edgerton and Judge Bazelon joined[1] (*id.*, pp. 3–5), and Judges Edgerton and Bazelon, in addition, indicated that they thought the conviction should be reversed for

[1] This was essentially an expansion of Judge Fahy's original dissenting opinion, the basis of which—*i. e.*, the view that the Subcommittee had empowered a single member to do no more than administer oaths and take sworn testimony and that this power was not broad enough to include authority to rule upon objections to the production of documents called for by a subpoena *duces tecum*—was thought by the dissenting judges to have been "fortifie[d]" by *Watkins*.

the "additional reason stated in [their] former dissent"[4] (*id.*, p. 5).

As stated in our former brief in opposition, the facts may be summarized as follows:

In December 1950, the Senate authorized and directed its Committee on the Judiciary, or any duly authorized subcommittee, to study and investigate the administration, operation and enforcement of the internal security laws of the United States and the extent, nature, and effects of subversive activities in the United States (S. Res. 366, 81st Cong., 2d Sess., 96 Cong. Rec. 16872; see Pet. 4–5). In accordance with this authorization, the Subcommittee on Internal Security was created in January 1951 (R. 33–34). Shortly after its organization the subcommittee passed a resolution to the effect that one member would constitute a quorum for the purpose of taking testimony (R. 34–35).[5]

On September 13, 1951, the Chairman of the Subcommittee issued a subpoena *duces tecum* directing petitioner to appear before the subcommittee (R. 63). Petitioner had been National President of the United Public Workers of America since 1946 (R. 39). The United Public Workers was an organization of be-

[4] The additional reason referred to was, essentially, the rule enunciated in *Quinn* v. *United States*, 349 U. S. 155, 165–166, according to which, where a witness before a congressional committee objects to a committee question, he must, before he may be held liable to conviction under 2 U. S. C. 192 for refusal to answer, be clearly apprised that the committee demands his answer notwithstanding his objections.

[5] See S. Res. 366, Sec. 2.

tween 35,000 and 50,000 members who were employed by federal, state, county and municipal governments (R. 53). The Subcommittee had information that petitioner was a member of the Communist Party (R. 51) and he had been described by an associate as a "tried fanatic" of the Party (R. 52).[6] Mr. Ewart Guinier, secretary-treasurer of the union, and the only other national officer (R. 49), was also a member of the Communist Party, according to the Subcommittee's information (R. 53), as were certain members of the board of directors, the governing body of the union (R. 53).[7]

The subpoena directed petitioner to produce and to bring with him the financial records of the union and "records of the union showing names and addresses for all members * * * who are employed by the Federal Government of the United States of America, and records showing the names and addresses of all members who are employed by any state, county, or municipal government located anywhere within the United States of America" (R. 63).

Petitioner appeared on October 5, 1951, before Senator Watkins, sitting as the Subcommittee by designation of the Chairman (R. 37). Immediately, petitioner, who was represented by counsel (R. 39), claimed there was no quorum present (R. 38). The

[6] Officers of the union were not required to sign non-Communist affidavits in order to represent employees (R. 44–45).

[7] A man who had in the recent past been Negotiations Director of the union was also said to be a member of the Communist Party (R. 53).

objection was overruled by Senator Watkins, who stated (R. 38):

> We do have a quorum. Under our rules, which we are to make, one present makes a quorum.

Pursuant to the subpoena, petitioner produced the financial records, but failed to submit the membership lists (R. 40–41). Explaining his failure to produce the membership records, he read a prepared statement in which he asserted (R. 42):

* * * * *

> Every individual who joins a union joins it with the confidence and trust supported by tradition and law that the act of joining and maintaining membership is a personal right and freedom that is inviolate. A request such as the present constitutes a wholesale invasion of such privacy and "the right to be let alone" which is protected by the fourth amendment. Every trade-union member imposes a special trust in his union officers to protect and preserve that right. Therefore, to submit to the request in this subpena would be a violation of the trust imposed in me by my membership and a betrayal of the entire tradition of the trade-union movement in this country. I have no doubt that not a single union president would find it possible to comply with such a request.

* * * * *

In the testimony that followed, he stated that he had "no such list" with him (R. 42), but that the union "generally" has such information (R. 43). He testified that there were "approximately" 35,000 mem-

bers in his union (R. 43) and that he could not tell exactly how many were employed by the Federal Government, but he would estimate "about" five per cent (R. 43). The other 95 per cent were employed by state, county and municipal governments (R. 43), but petitioner could give only a "general idea" as to the agencies and areas where such membership was concentrated (R. 44). He named three federal agencies[*] in which the "main bulk" of the federal membership was concentrated (R. 43), but declined to name other federal agencies where the union had members because he did not have the "facts" (R. 46). He was thereupon directed to produce the records in accordance with the subpoena *duces tecum* (R. 46–47) and the following transpired (R. 47):

> Senator WATKINS. Do you understand the request made of you?
>
> Mr. FLAXER. Yes; I do.
>
> Senator WATKINS. Do you stand on your statement that you refuse to produce those?
>
> Mr. FLAXER. I didn't say I refused. I indicated the situation is such that I find myself incapable of producing them. I think if I complied with a request of that kind, first of all I don't think I have the right either in terms of our membership or in terms of the labor movement generally——
>
> Mr. ARENS [counsel to the Subcommittee]. But you do have the information?
>
> Mr. FLAXER. In a general sense, I think I have the information.

[*] Those agencies were the Bureau of Engraving, Post Office Department, and the Veterans Administration (R. 43).

Mr. ARENS. And you have not complied with the command of the subpena to produce that information.

Mr. FLAXER. I think it is an improper command, sir.

Senator WATKINS. That is the reason you have refused to bring them here today, because you think it is improper?

Mr. FLAXER. That is the reason I haven't got them.

Senator WATKINS. That is the main reason. You are directed by the committee to produce those records according to the terms of the subpena.

Mr. Flaxer persisted in his contention that the Subcommittee was "infringing on a right that workers in America have, including federal employees" (R. 47). In response to further questioning he told the subcommittee that the required lists could be prepared in a week (R. 49). Thereupon, the following colloquy occurred (R. 49–50):

Senator WATKINS. Since you have made the reply that it could be done in a week, that will be the order of the committee, that you submit that information as requested by counsel for the committee within 10 days from this date. The record will show that you of course have been given that notice and that requirement has been made, and the order has been made.

* * * * *

Mr. FLAXER. I haven't got them. I don't feel capable of producing them.

Senator WATKINS. You said you could do it within a week.

Mr. FLAXER. No; that was not the question he asked. He asked could the list be compiled within a week and I said it could.

Mr. ARENS. The information is available to you?

Mr. FLAXER. Yes.

Mr. ARENS. But you have declined to produce it; is that correct?

Mr. FLAXER. I haven't produced them.

Mr. ARENS. Will you produce it pursuant to the order of the chairman of this session within 10 days from today?

Mr. FLAXER. I will have to take that under consideration.

Senator WATKINS. That is the order, and of course we will have to take whatever steps are necessary if at the end of the time you have not produced them.

The Subcommittee never received the membership list (R. 71).

At his trial, petitioner did not take the stand. However, the defense introduced in evidence a copy of a letter, dated October 13, 1951, addressed by petitioner to Senator Watkins (R. 75). In this letter he repeated the text of the prepared statement he had read to the Subcommittee on October 5 (R. 76–77).[*] He concluded by stating (R. 77):

During the time that has elapsed since the date of that hearing, I have again given due consideration to the committee's request for those membership lists and have come to no other conclusion than that given to you on

[*] Compare R. 76–77 with R. 41, 42.

October 5th, as quoted above; and, therefore, again reiterate my request that the committee withdraw its demand for the membership lists.

Senator Watkins did not receive the letter (R. 74–75).

ARGUMENT

I

Petitioner contends (Pet. 22–26) that the Court of Appeals has "trivialized *Watkins* [354 U. S. 178] and repudiated its principles" (Pet. 22). We submit, on the contrary, that the decison below is correct under the rationale of that case.[10]

(*a*). In *Watkins*, this Court held that, since it is of the essence of the offense defined by 2 U. S. C. 192 that the question or questions which the witness has been asked and has refused to answer have been "pertinent to" the subject under inquiry by the committee, due process demands that, "*[u]nless the subject matter has been made to appear with undisputable clarity*" (from the totality of the circumstances attending the asking of the question, including the terms of the committee's authorizing resolution), and "*upon objection of the witness on grounds of pertinency,*" he be clearly apprised, at the time his answers are demanded, "what the topic under inquiry

[10] The present contention has the support of none of the dissenting judges below. While Judge Fahy's dissenting opinion, in which Judges Edgerton and Bazelon concurred, invokes the rationale of *Watkins* as "fortif[ying]" his dissenting views on the "quorum" question (discussed *infra*, pp. 18–21), the latter question is separate and distinct from the basic *Watkins* issue, as petitioner himself recognizes by his separate treatment of that question (see Pet. 26–30).

is and the connective reasoning whereby the precise questions asked relate to it" (354 U. S. at 208–215; emphasis added).

In appraising the merits of petitioner's contention that his conviction cannot be sustained in the face of this holding,[11] it is important that (a) of the approximately 35,000 members of the United Public Workers of America, whose records petitioner (the group's National President (R. 39)) was called upon to produce, "about 5 percent," or roughly 1,750 persons, were, according to petitioner's own testimony before the committee, currently in the employ of the Federal Government, the remaining 95% being in the employ of state, county, and municipal governments throughout the United States (R. 43–44); (b) petitioner had been previously identified by a witness or witnesses before the committee as a member of the Communist Party, one witness having described him as a "tried fanatic" or "hard core member" of the Party (R. 51, 52–53); and (c) other information in the committee's files indicated that, in addition to petitioner, the union's secretary-treasurer and only other national officer (one Ewart Guinier), certain members of the board of directors, the governing body of the union, and another individual who in the recent past had been the "negotiations director" of the union were also Party members (R. 49, 53). In short, the com-

[11] While *Watkins* involved a refusal to answer questions, it is not disputed that its rationale is equally applicable to a refusal to produce documents pursuant to a subpoena *duces tecum*, the offense involved here.

mittee had information that petitioner's union, the records of whose membership he was called upon to produce, was penetrated at the top by members of the Communist Party; that its highest national leader—petitioner himself—was a "hard core member" of that Party; and that some 1,750 of its members were in the current employ of the Federal Government, with the remaining 33,250 in the employ of state and local governments throughout the country.

If the committee's information was correct, it is evident that the union was, or very possibly was, a "Communist-front organization" as defined by the Internal Security Act of 1950.[12] It is also evident that, if the committee's information was correct, there were grounds for believing (at the least) that substantial numbers of the union's then-current members could well be members of the Communist Party. And since, by petitioner's own admission, close to 2,000 of those members were at that time in the employ of the Federal Government, the committee had cause to inquire into the possibility that members of the union who were also members of the Communist Party were then in the employ of the Federal Government.

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[12] Section 3 (4) of that Act (50 U. S. C. 782 (4)) defines a "Communist-front organization" as "any organization in the United States" other than a "Communist-action organization" which is "substantially directed, dominated, or controlled by a Communist-action organization" and is "primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement." For the definition of a "Communist-action organization," see Section 3 (3) (50 U. S. C. 782 (3)).

The committee's authorizing resolution (Senate Resolution 366),[13] "authorized and directed" it to "make a complete and continuing study and investigation" of "(1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, *and infiltration* by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence" (emphasis added). The specific subject under inquiry in petitioner's case was plainly germane to the field of the committee's jurisdiction and special interest, and clearly authorized by this enabling resolution.[14] Particularly is this true in the light of the formal legislative finding of Congress—as

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[13] Senate Resolution 366, 81st Cong., 2d Sess. (1950) (96 Cong. Rec. 16872). The terms of this resolution are set forth at Pet. 4, as well as at pp. 3–4 of our former brief in opposition.

[14] Petitioner states that the court below, on remand, "switched its theory of the case so as to hold the subpoena sustainable under the first two clauses of the Subcommittee's charter, whereas it had previously relied on the third clause" (Pet. 24), and argues that "this fluid transition from one source of authority to another" furnishes "another demonstration that the Subcommittee's demands had no defined legislative purpose" (*ibid.*). There is, however, no basis for the statement that the court below "switched its theory of the case." The statement assumes (1) that Judge Miller's majority opinion, when the

set forth in Section 2 (1) of the Internal Security Act (50 U. S. C. 781 (1)), the administration of which was a primary concern of this committee under its charter—that "[t]here exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, *infiltration into other groups* (*governmental and otherwise*), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization" (emphasis added).

(*b*). We submit, furthermore, that the transcript of the proceedings before the committee (see Pet. App.

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case was initially decided, relied solely on the third clause of Senate Resolution 366 as the committee's authorization for the inquiry it was engaged in when it issued the subpoena in issue, and (2) that Judge Prettyman's opinion, following the remand, relies solely on the first two clauses of the resolution (Pet. 12, 13–14). Neither assumption is correct. Judge Miller's opinion cited and relied upon all three clauses of the resolution as granting authority for the inquiry (Pet. App. B, p. 8; 235 F. 2d at 825–826). And the mere fact that Judge Prettyman's opinion, in mentioning that the Senate Resolution here involved "is more precise than the House Resolution criticized in *Watkins*," refers to *Sacher* v. *United States*, 252 F. 2d 828 (C. A. D. C.) (reversed on other grounds, May 19, 1958) (which — see at pp. 831–832 — found it necessary to consider only the first two clauses of the Senate Resolution) does not warrant petitioner's supposition (see Pet. 13) that Judge Prettyman, unlike Judge Miller, intended to rely solely on the first two clauses of the resolution. There is, in short, no sufficient reason to believe that the court below, both originally and on remand, did not look to Senate Resolution 366 in its entirety as the committee's authorization for the inquiry in which it was engaged when it subpoenaed the records here in issue.

B, pp. 10–15, where pertinent portions of the transcript are set forth as an appendix to the Court of Appeals' former opinion) shows that the pertinence of the records sought was known to petitioner. He knew the subject under inquiry—the extent of Communist infiltration of the union of which he was the national leader, and, concomitantly, the extent of Communist infiltration (through members of this union) of the Federal Government as well as state and local governments throughout the country. He must have known the relevance to that subject of the information sought by the committee, *i. e.*, the union's records of its membership, showing which members worked for the Federal Government and which for state and local governments. In any event, as observed by Judge Prettyman (Pet. App. C, p. 2), petitioner at no time objected to the production of these records on the ground of lack of pertinency to the committee's subject of inquiry [15]—doubtless because he appreciated the records' pertinency. And, as we have pointed out (*supra*, pp. 11–12), at the heart of the *Watkins* holding is the requirement that the witness,

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[15] As noted by Judge Prettyman, "Flaxer's responses to questions demonstrated that he knew what the subject of the inquiry was. In response to the subpoena he produced the financial and various other records of his union and, without objecting, presented them to the Committee on the record. He thus indicated that he recognized the nature of the question under inquiry. He refused to produce the membership lists but not upon the ground they were not pertinent. He objected on the ground that the Government as an employer is not entitled to know which of its employees belong to unions; he made an extensive statement of his position on that point" (Pet. App. C, p. 2). And while petitioner, as Judge Prettyman notes, did at one point in his colloquy with Senator Watkins use the word "ir-

in order successfully to defend against a charge of willful refusal to answer questions or comply with a subpoena, must have *raised the issue* of lack of pertinency, by appropriate objection, at the time he was called upon to answer the questions or to produce the documents. This is a proper qualification since the purpose of the requirement is to give the committee the opportunity to explain to the witness the logical nexus between the answer or document sought and the subject of inquiry, in the event that the nexus was not "undisputabl[y]" clear already.[16]

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relevant," the context in which he used it makes clear that he was not thereby objecting on pertinency grounds in the *Watkins* sense (see *id.*, pp. 2–3). His point, while it is not entirely clear, was apparently that, unless the records sought were made public (as distinguished from production in executive session, solely for the committee's use), they would be "irrelevant" as potential "blacklists"—a use to which petitioner gratuitously charged the committee with intending to put the subpoenaed records (see Pet. App. B, p. 14). Petitioner's assumption (Pet. 18, 25) that the committee, by not formally and in so many words repudiating petitioner's charge that the purpose in subpoenaing the membership records was to use them as "blacklists," acknowledged that this was their purpose is manifestly unwarranted, and is refuted, furthermore, by the entire tenor of the committee's statements during the course of petitioner's testimony (see, in particular, Pet. App. B, p. 13).

[16] In the case at bar, even if petitioner had objected to the production of the records on grounds of lack of pertinency, and the committee had explained their relevancy to him, he could not have produced them then and there because he had disabled himself in advance by refraining from preparing them and bringing them to the hearing. It thus seems, as observed by the court below in its former opinion (Pet. App. B, p. 6), "that he had decided in advance he would not obey in any circumstances." In view of this, it is somewhat ironic for petitioner to now complain (see Pet. 24–25) that the committee failed to explain to him how the records which he refused to produce were pertinent to its inquiry.

(*c*). Petitioner's subsidiary contention (Pet. 24) that under the rationale of *Watkins* the Internal Security Subcommittee's authorizing resolution—Senate Resolution 366—is invalid on its face, and thus provided no basis for a valid subpoena, is equally untenable. As pointed out in Judge Prettyman's opinion below (Pet. App. C, p. 2), it seems clear from the *Watkins* opinion that the Court did not in that decision declare the House Un-American Activities Committee's authorizing resolution to be invalid on its face. See Brief for the United States In Opposition, *Barenblatt* v. *United States*, No. 787, this Term, pp. 12–13 (certiorari granted, April 14, 1958, 356 U. S. 929). And Senate Resolution 366 (*supra*, p. 14) is more precise than the House resolution criticized in *Watkins*. In particular, it does not include the term "un-American," whose indefiniteness this Court alluded to in *Watkins* (354 U. S. at 202). The only real point of similarity between the two resolutions is the use in both of the word "subversive." Even if it were to be assumed *arguendo* that that term lacks the specificity desirable in an enabling resolution, the clarity and specificity of the remainder of Senate Resolution 366 leave little doubt of the area of authority conferred by that resolution on the Internal Security Subcommittee. See *Sacher* v. *United States*, 252 F. 2d 828, 831–832 (C. A. D. C.), No. 828, this Term, reversed on other grounds, May 19, 1958.

II

Senate Resolution 366, the source of the Internal Security Subcommittee's powers, provides in its second section (see Pet. 4–5) that "[a] majority" of the

members of the Subcommittee "shall constitute a quorum for the transaction of business, except that a lesser number, to be fixed by the * * * subcommittee, shall constitute a quorum for the purpose of administering oaths and taking sworn testimony."[17] Pursuant to this authority, and by designation of the Chairman of the Subcommittee, a single Senator—Senator Watkins, a Subcommittee member—was sitting as a subcommittee of one on the day on which petitioner appeared and refused to produce the subpoenaed records; Senator Watkins, in other words, "comprise[d] the subcommittee that day" (R. 37; see also R. 38).

When this case was decided originally by the court below, the fact that it was a "one-member" Subcommittee which heard and overruled petitioner's objection to the production of the subpoenaed records formed the sole basis of Judge Fahy's dissent. He dissented, he said, "on the ground that the Subcommittee had empowered a single member only to administer oaths and to take sworn testimony and this power was not broad enough to include authority in but one member to rule upon objections to the production of documents called for by a subpoena *duces tecum*" (Pet. App. B, p. 19).[18] On remand of the case for consideration in the light of *Watkins*, Judge Fahy, joined by Judges Edgerton and Bazelon, expressed the view that "*Watkins* fortifie[d] the basis

[17] See also Senate Resolution 180, 81st Cong., 2d Sess. (Pet. 5).

[18] Judges Edgerton and Bazelon were also of this view (see their separate dissenting opinion at Pet. App. B, p. 18). In addition, they dissented on a separate ground (see fn. 4, *supra*, p. 5).

of [his] previous dissent" (Pet. App. C, p. 4). He thus explained the basis of his view (*ibid.*):

> Under *Watkins* a delegation by Congress or by the Senate or the House of Representatives to an investigative committee must "spell out that group's jurisdiction and purpose with sufficient particularity. Those instructions are embodied in the authorizing resolution. That document is the committee's charter." 354 U. S. at 201. There the Court was considering the question of the committee's authorized scope of inquiry as it bore upon the pertinency of questions asked a witness. But the force of *Watkins* cannot be confined to issues of pertinency. *Watkins* requires as well clarity and certainty in the delegation of whatever power is sought to be exercised to compel obedience by a witness on pain of punishment for crime for not obeying. In that light *Watkins* fortifies the basis of my previous dissent. The charter here was the resolution of the parent Subcommittee delegating specified authority to a one-member subcommittee. To repeat, this subcommittee, before whom appellant appeared, was given authority only to administer oaths and to take sworn testimony. Its charter is expressed only in those terms. The broader authority claimed is not to be implied. * * *

Petitioner adopts this argument of Judge Fahy's (Pet. 29).

We submit, however, for the reasons stated in our former brief in opposition (at pp. 15–17), that the power which was lodged in Senator Watkins, sitting as a one-member subcommittee, to "tak[e] sworn testimony" clearly included the power to receive sub-

poenaed documents as normally ancillary to the taking of testimony. And if so, the power also included the authority to entertain and pass upon objections to the production of subpoenaed documents, for the same reason that it surely included the power to entertain and pass upon objections to the requiring of testimony.

Judge Fahy, it is to be noted, does not suggest that a single Senator or Congressman in whom there had been lodged the authority to take sworn testimony would lack the power—normally incident to that authority—to pass upon a witness' objections to propounded questions. *Watkins* itself would seem to recognize that in such a situation the single Senator or Congressman would possess this power: "To carry out this mission [*i. e.*, of obtaining facts upon which the full legislature can act], committees and subcommittees, *sometimes one Congressman*, are endowed with the full power of the Congress to compel testimony" (354 U. S. at 200-201, emphasis added).

Nor is there much danger that such power might be abused by a single Senator. As noted in our former brief in opposition (at p. 17), a majority of the Subcommittee was required to report petitioner's contumacy to the Senate, and it required action by the Senate itself to certify the fact of petitioner's contempt to the United States Attorney for prosecution."[19]

[19] While petitioner raised a point of "no quorum" at the outset of his appearance before the committee (R. 38-39), he made no distinction between a quorum for the purpose of taking testimony and a quorum for the purpose of ruling upon his objection to the production of the subpoenaed records. Senator Watkins, in overruling his "no quorum" objection,

III

Petitioner's remaining contentions are in substance repetitions of points made in his earlier petition for certiorari. Since none is essentially affected by the *Watkins* decision, we rest on our replies to these points in our earlier brief in opposition.[20]

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simply advised him that "[u]nder our rules, * * * one present makes a quorum" (R. 38). By failing to make a "no quorum" objection specifically addressed to the question of the power of the one-member committee to rule upon an objection to the production of subpoenaed documents, petitioner failed to give Senator Watkins an opportunity to consider that specific objection. It is possible that the Senator, had such a specific objection been made, might have reserved for the full subcommittee the question of petitioner's substantive objections to production, thereby eliminating the "quorum" point from the case. Since petitioner did not raise the point, we think he must be deemed to have waived it. Compare the discussion, *supra*, pp. 16–17, of the necessity, under *Watkins*, of the making of an objection on pertinency grounds to a question whose pertinency is not entirely clear, so as to give the committee the opportunity to explain pertinency.

[20] On the question of whether the subpoena was issued pursuant to a valid legislative purpose, or whether it involved an unwarranted "wholesale intrusion into private affairs" (Pet. 16–22), see our earlier brief in opposition (No. 462, Oct. Term, 1956), pp. 11–15; see also, on this issue, *supra*, pp. 11ff. On the "quorum" question (Pet. 26–30), see the earlier brief in opposition, pp. 15–17; see also *supra*, pp. 18–21, where the claimed impact of *Watkins* on this issue is discussed. On the issue of whether the Subcommittee's direction to petitioner to produce the subpoenaed records notwithstanding his stated objections met the requirements of *Quinn* v. *United States*, 349 U. S. 155, 165–166 (Pet. 30–31), see our earlier brief in opposition, pp. 17–19.

CONCLUSION

For the foregoing reasons, it is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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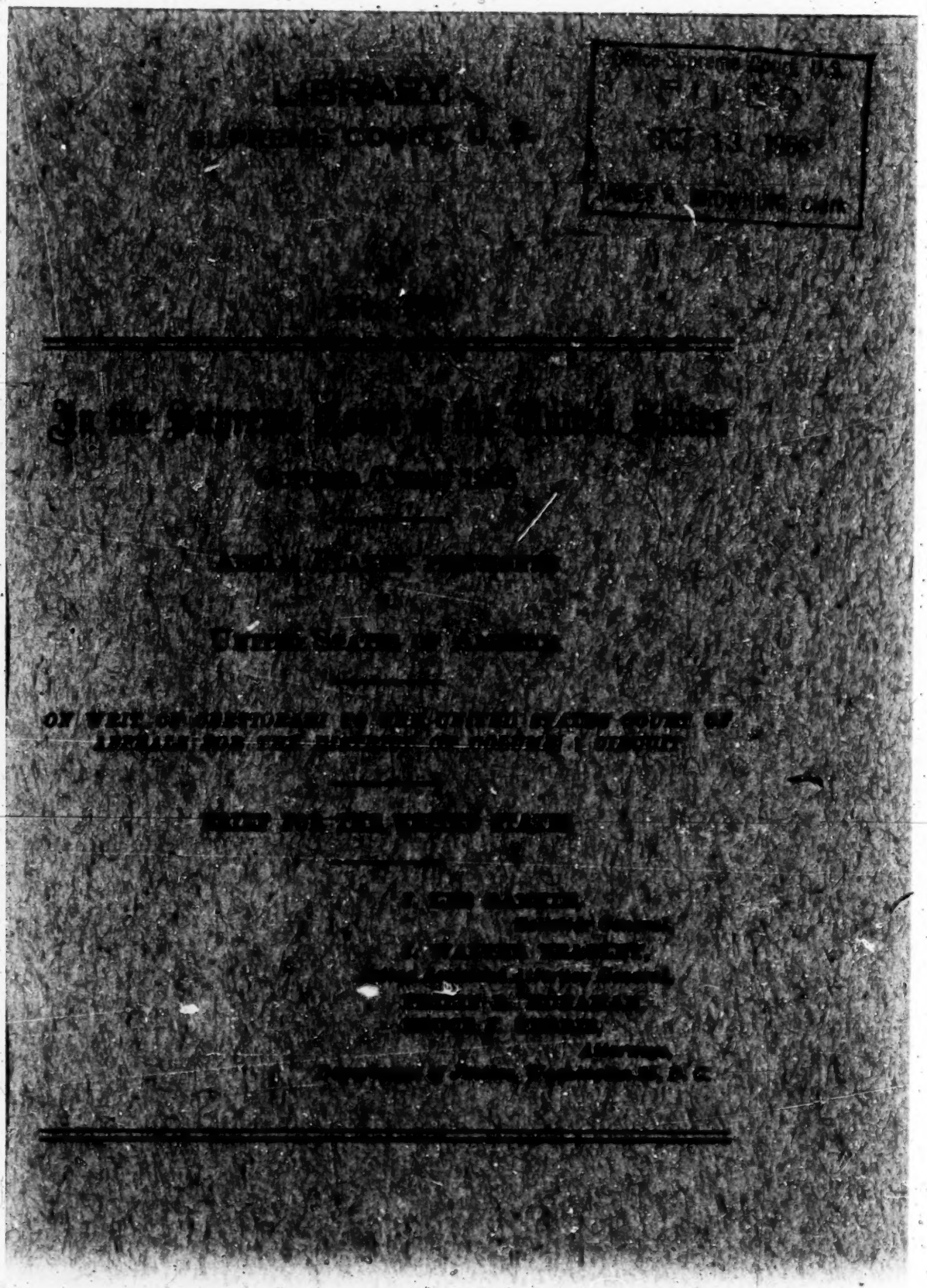

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 60

ABRAM FLAXER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court denying petitioner's motion for judgment of acquittal notwithstanding the verdict or in the alternative for a new trial (R. 14–20) is reported at 112 F. Supp. 669.

The two prevailing (R. 116–118, 118) and two dissenting opinions (R. 118–120, 120) in the Court of Appeals, sitting *en banc,* which were rendered following this Court's remand of the case (R. 115; 354 U. S. 929) for consideration in the light of *Watkins v. United States,* 354 U. S. 178, have not yet been reported. The original majority (R. 96–110) and two dissenting opinions (R. 110–114, 114) in the Court of

Appeals, likewise sitting *en banc*, are reported at 235 F. 2d 821.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on April 3, 1958 (R. 120–121). The petition for a writ of certiorari was filed on April 29, 1958, and was granted on June 9, 1958 (R. 122). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether Senate Resolution 366, 81st Congress, 2d session, which created the Subcommittee on Internal Security and defines its powers, is sufficiently definite to support the use of compulsory process.

2. Whether the inquiry by the Senate Subcommittee on Internal Security into the extent of Communist infiltration into the United Public Workers of America had a valid legislative purpose.

3. Whether the group's membership lists, which petitioner, its president, refused to make available to the Subcommittee, were in fact pertinent to the inquiry.

4. Whether under the Rules of the Senate a properly constituted quorum ruled upon petitioner's objection, and whether petitioner properly raised before

[1] Judges Bastian and Burger took no part in the consideration or decision of the case on either occasion. In both instances, the court divided 4 to 3 in favor of affirming the conviction, the same judges comprising the majority and minority on each occasion. The majority originally wrote a single opinion, but on the remand Judge Prettyman wrote an opinjon which was concurred in by Judges Miller and Danaher, and Judge Washington indicated in a brief concurring opinion that he "concur[red] in the result." See *infra*, pp. 4–5.

the Subcommittee the issue of the absence of a quorum to rule upon his objection to being required to produce the membership lists.

5. Whether the fact that petitioner was not in terms informed by the Subcommittee of the basis of pertinency of the membership lists was a bar to his conviction under 2 U. S. C. 192 for refusal to produce the lists, he having made no objection to producing them on grounds of lack of pertinency.

6. Whether, after petitioner had apprised the Subcommittee of his objections to being required to comply with its demand for the membership lists, the Subcommittee's direction to produce the lists "according to the terms of the subpena" met the requirements of *Quinn* v. *United States*, 349 U. S. 155.

7. Whether, since petitioner deliberately disabled himself from producing the membership lists by not bringing them to the hearing, he had standing at his trial to rely upon grounds for refusal to produce which related solely to events occurring at the hearing itself.

STATUTE, RESOLUTION, AND RULE INVOLVED

2 U. S. C. 192 (Rev. Stat., § 102, as amended), the pertinent provisions of Senate Resolution 366, 81st Cong., 2d sess., adopted December 21, 1950 (96 Cong. Rec. 16872), and Rule XXV (3) of the Standing Rules of the Senate, as amended by Senate Resolution 180, 81st Cong., 2d sess., adopted February 1, 1950 (96 Cong. Rec. 1284), are set forth in the Appendix, *infra*, pp. 85–87.

STATEMENT

Petitioner, on November 20, 1952, was charged in a two-count indictment (R. 2–3), returned in the United States District Court for the District of Columbia, with having willfully refused, in violation of 2 U. S. C. 192 (Rev. Stat., § 102, as amended) (Appendix, *infra*, p. 85), to produce, pursuant to a subpoena *duces tecum* issued by the Subcommittee on Internal Security of the Senate Committee on the Judiciary, records of the United Public Workers of America showing the names and addresses of members of that organization who were employed by the United States Government (count 1) and by any state, county, or municipal government in the United States (count 2). Found guilty by a jury on both counts (R. 94), petitioner was sentenced generally to two months' imprisonment and to pay a fine of $1,000 (R. 20–21). On appeal to the Court of Appeals for the District of Columbia Circuit, the judgment of conviction was, on June 21, 1956, affirmed by that court sitting *en banc*, by a divided vote, Judges Bastian and Burger taking no part in the consideration or decision of the case (R. 96–114; 235 F. 2d 821). The majority opinion was written by Judge Miller and concurred in by Judges Prettyman, Washington, and Danaher (R. 96–110). Chief Judge Edgerton and Judge Bazelon joined in one dissenting opinion (R. 110–114) and Judge Fahy dissented in a separate opinion (R. 114).

Thereafter, this Court, on June 24, 1957, on petition for a writ of certiorari to review this judgment, granted the petition, vacated the judgment of affirmance, and remanded the case to the Court of Appeals

"for consideration in light of *Watkins* v. *United States,* 354 U. S. 178" (354 U. S. 929). The case was thereafter rebriefed and reargued in the Court of Appeals, which again sat *en banc.* On April 3, 1958, that court again affirmed the judgment of conviction (R. 120–121), with Judges Bastian and Burger taking no part. Judge Prettyman wrote an opinion in which Judges Miller and Danaher joined (R. 116–118). Judge Washington indicated in a brief concurring opinion that he "concur[red] in the result, finding no impediment in *Watkins,* or other controlling authority, to affirmance of the conviction" (R. 118). Judge Fahy wrote a dissenting opinion in which Chief Judge Edgerton and Judge Bazelon joined[2] (R. 118–120), and Judges Edgerton and Bazelon, in addition, indicated that they thought the conviction should be reversed for the "additional reason stated in [their] former dissent"[3] (R. 120).

The pertinent facts may be summarized as follows:

On December 21, 1950, shortly following the enactment of the Internal Security Act of (September 23),

[2] This was essentially an expansion of Judge Fahy's original dissenting opinion, which expressed the view that the Subcommittee had not empowered a single member to rule upon objections to the production of documents called for by a subpoena *duces tecum*—a view which was thought by the dissenting judges to have been "fortifie[d]" by *Watkins* (R. 119).

[3] The additional reason referred to was, essentially, the rule enunciated in *Quinn* v. *United States,* 349 U. S. 155, 165–166, according to which, where a witness before a congressional committee objects to a committee question, he must, before he may be held liable to conviction under 2 U. S. C. 192 for refusal to answer, be clearly apprised that the committee has overruled his objection or objections, *i. e.*, that the committee demands his answer notwithstanding his objections.

1950, 64 Stat. 987, the Senate authorized and directed its Committee on the Judiciary, "or any duly authorized subcommittee thereof," to make a "complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence" (S. Res. 366, 81st Cong., 2d sess., 96 Cong. Rec. 16872; Appendix, *infra*, p. 86; R. 32–33). Pursuant to this authorization, there was created, in January 1951, a subcommittee of the Committee on the Judiciary popularly referred to as the Senate Internal Security Subcommittee[*] (R. 33–34). Seven Senators were named to the Subcommittee, of which Senator McCarran was made Chairman (R. 34). Shortly following its organization, in January 1951, at a session at which all members except one were present, the Subcommittee, pursuant to the authority conferred by Sec-

[*] The formal name of the Subcommittee is the "Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the [Senate] Committee on the Judiciary."

tion 2 of Senate Resolution 366 and subsection 3 (b) of Rule XXV of the Standing Rules of the Senate (as amended by S. Res. 180, 81st Cong., 2d sess.) (see Appendix, *infra*, pp. 86–87), adopted a resolution to the effect that a single member would constitute a quorum for the purpose of taking testimony (R. 34–35.)

In or about April, 1951, the Subcommittee commenced a series of public hearings in connection with an investigation it was conducting into the affairs and personnel of the United Public Workers of America (the "UPWA"), which organization, the committee's information tended to show, (1) was heavily infiltrated, at least at the top, by members of the Communist Party, and (2) had substantial numbers of members who were currently in the employ of the Federal Government (R. 50–53; Hearings before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, United States Senate, 82d Cong., 1st sess., on *Subversive Control of the United Public Workers of America*, Part II, April 12, 13, May 11, 1951, p. 135 *ff.*)

On September 13, 1951, the Chairman of the Subcommittee issued a subpoena *duces tecum* directing petitioner, who then was (and had been since 1946) the National President of the UPWA (R. 39), to appear before the Subcommittee and bring with him such records of the union as would show the total amount of funds then in its possession, the sources of its funds, their place of deposit, the names of all organi-

zations to which the union had contributed within the preceding twelve months, and the names and addresses of all members of the union then in the employ of the Federal Government and the names and addresses of all members then in the employ of any state, county, or municipal government in the United States (R. 63–64). At petitioner's trial, Richard Arens, the staff director of the Subcommittee at the time of petitioner's appearance before it (R. 62), at a hearing before the court in the absence of the jury for the purpose of inquiring into the pertinency to the subject under inquiry by the Subcommittee of the records which petitioner was called upon to produce, was asked "why the committee subpoenaed Mr. Flaxer and his union records" (R. 50–51). Mr. Arens, replying, referred to "the resolution under which the committee was operating; that is, to maintain a kind of surveillance over the administration and operation of the internal security laws of the country, and to ——", at which point he was interrupted by an objection by defense counsel (R. 51). Government counsel said that he thought he could "shorten it up" (R. 51), following which, in reply to counsel's questions, Mr. Arens testified: that prior to the issuance of the subpoena to petitioner there had appeared before the Subcommittee a number of witnesses who had given testimony concerning petitioner (R. 51); that these witnesses had identified petitioner as a member of the Communist Party with whom they had associated in the Party (R. 51–52); that one witness had identified petitioner as a "tried fanatic of the

communist party" (R. 52);[5] that the UPWA, according to other testimony adduced before the Subcommittee, "was an organization with some 35,000 to 50,000 [members]—the estimates varied—who were employed in various governmental agencies—federal, state, county, municipalities" (R. 53); that petitioner, "a hard core member of the communist party," was, according to the committee's information, the president of the UPWA; that the secretary-treasurer, one Ewart Guinier, had likewise been identified before the Subcommittee as a member of the Communist Party,[6] as had "certain of the members of the executive board" and a man who had in the recent past been negotiations director of the UPWA (R. 53).[7]

Petitioner appeared before an executive session of the Subcommittee pursuant to the aforesaid subpoena on October 5, 1951 (R. 37). By designation of the Chairman of the Subcommittee, Senator Watkins was the only Subcommittee member present, *i. e.*, he "com-

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[5] See Hearings before the Subcommittee To Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, United States Senate, 82d Cong., 1st sess., on *Subversive Control of the United Public Workers of America*, Part I, July 27, August 9, 23, 25 and 29, September 28, October 5 and 10, December 14, 1951, pp. 35–36.

[6] Guinier was described as being "under Communist Party discipline" and "one of the most effective Stalinist operatives that there is" (Hearings, etc. (see preceding footnote), p. 36). In his own testimony before the Subcommittee petitioner indicated that he and Guinier were the only "national officers" of the UPWA (R. 49).

[7] Since the union, representing governmental employees, had no bargaining rights, officers of the union were not required to sign non-Communist affidavits in order to represent employees (R. 44–45). See 29 U. S. C. 152 (2), (3), and (5).

prise[d] the subcommittee that day" (R. 37). Immediately after being sworn, petitioner, who was represented by counsel (R. 39), objected to proceeding further on the ground that there was "no quorum" present (R. 38). The objection was overruled by Senator Watkins, who stated (R. 38):

> We do have a quorum. Under our rules, which we are to make, one present makes a quorum.

Petitioner said he was "not sure about that" and that he wished "the record [to] show that I object to the fact that I think there is no quorum" (R. 38). Senator Watkins, remarking that the record would "show [his] statement," directed counsel to proceed (R. 39). There was no further discussion of the matter of a quorum at any time during the remainder of petitioner's testimony.

Pursuant to the subpoena, petitioner produced the several financial records of his union which were called for (see *supra*, pp. 7–8) (R. 39–41), but failed to produce the membership lists (R. 41). Explaining his failure to produce the membership records, he read the following prepared statement (R. 41–42):

> The demand for the production of this item raises a number of profoundly serious issues. From the very beginning of the union movement in this country, the rights of unions to the privacy of their membership records * * * has been one of the basic precepts to which the labor movement of America has adhered. Bitter experience has taught American labor that the right to join a union is an empty right unless the fact of membership can be kept private.

Throughout our history, employers and anti-labor groups have attempted to violate the secrecy of union records in order to compile blacklists for the sole purpose of destroying unions. This has been amply documented in the hearings of the LaFollette committee. After bitter struggles in and out of the Halls of Congress, labor has succeeded in enacting into law this right of privacy. Countless decisions of the National Labor Relations Board and of our Federal courts have upheld that right. Indeed, the mere query by an employer of an employee as to his union membership has been held to be an unfair labor practice even under the Taft-Hartley Act.

Every individual who joins a union joins it with the confidence and trust supported by tradition and law that the act of joining and maintaining membership is a personal right and freedom that is inviolate. A request such as the present constitutes a wholesale invasion of such privacy and "the right to be let alone" which is protected by the fourth amendment. Every trade-union member imposes a special trust in his union officers to protect and preserve that right. Therefore, to submit to the request in this subpena would be a violation of the trust imposed in me by my membership and a betrayal of the entire tradition of the trade-union movement in this country. I have no doubt that not a single union president would find it possible to comply with such a request.

I am confident that the members of this committee, after considering my views and after a study of the full implications of the request made in this subpena, will realize its conflict

with the basic union tradition of this country now incorporated into Federal law and withdraw the demand for membership lists.

Following his reading of this statement, petitioner was asked if he "ha[d] such a list" (R. 42). He replied that he had "no such list with" him (R. 42). Asked if the UPWA "ha[d] the information available," he replied that "we generally have such information" (R. 42). In response to further interrogation, he testified that there were "about 35,000 members" in his union (R. 43); that, of these, "about 5 percent" were in the employ of the Federal Government (R. 43); that "the other 95 percent" were employed in state, county, and municipal governments (R. 44); and that he was able to give only a "general idea" as to the state agencies and state areas in which these members were located (R. 44). He named three federal agencies—the Bureau of Engraving, Post Office, and Veterans' Administration—in which the "main bulk" of the federal-employee membership was concentrated (R. 43, 45–46), but declined to name other federal agencies where the union had members because he did not have "the facts" (R. 46).

Counsel then asked that petitioner be directed to produce the membership records in accordance with the subpoena *duces tecum* (R. 46–47) and the following transpired (R. 47):

Senator WATKINS. Do you understand the request made of you?

Mr. FLAXER. Yes; I do.

Senator WATKINS. Do you stand on your statement that you refuse to produce those?

Mr. FLAXER. I didn't say I refused. I indicated the situation is such that I find myself incapable of producing them. I think if I complied with a request of that kind, first of all I don't think I have the right either in terms of our membership or in terms of the labor movement generally——

Mr. ARENS [counsel to the Subcommittee]. But you do have the information?

Mr. FLAXER. In a general sense, I think I have the information.

Mr. ARENS. And you have not complied with the command of the subpena to produce that information.

Mr. FLAXER. I think it is an improper command, sir.

Senator WATKINS. That is the reason you have refused to bring them here today, because you think it is improper?

Mr. FLAXER. That is the reason I haven't got them.

Senator WATKINS. That is the main reason. You are directed by the committee to produce those records according to the terms of the subpena.

Petitioner at this point renewed his contention that the Subcommittee was "infringing on a right that workers in America have, including Federal employees" (R. 47). In response to further questioning he told the Subcommittee that he "imagine[d]" that the membership lists called for by the subpoena could be prepared within a week (R. 49). The committee counsel then suggested to the committee that petitioner be ordered to produce the information and

transmit it to the committee within ten days (R. 49). Thereupon, the following occurred (R. 49):

> Senator WATKINS. Since you have made the reply that it could be done in a week, that will be the order of the committee, that you submit that information as requested by counsel for the committee within 10 days from this date. The record will show that you of course have been given that notice and that requirement has been made, and the order has been made.

Petitioner then asked the Subcommittee to "reconsider that" on the ground that "organized labor in America will recognize in this a break in the wall that they have built up over a half a century against the initiation of blacklists. I don't think that these lists can be looked upon in any other light than as blacklists" (R. 49).

A moment later, Senator Watkins, in apparent reference to these last-quoted remarks of petitioner, said (R. 49):

> May I direct your attention to the fact that this is an executive session and the records are not public here unless the order of the committee is to make them public. But at least for the present the records are to be delivered to the committee in executive session.

The following colloquy then occurred (R. 50):

> Mr. FLAXER. Sir, on that I don't see any good purpose that these records would serve, even if I were to produce them. I think they are wholly irrelevant, if you say they are not to be made public.
>
> Senator WATKINS. I am not promising you they would not be made public, because I do not

think the Government has to make such a promise to get the information.

When petitioner indicated, at this point, that he was about, once again, to renew his argument as to why he should not be compelled to produce the membership lists, Senator Watkins interrupted him and the following transpired (R. 50):

Senator WATKINS. Whatever your argument is, that is the order now, and, as I understand it, you refuse to do so on the ground you set forth. I want to make the record clear.

Mr. FLAXER. I haven't got them. I don't feel capable of producing them.

Senator WATKINS. You said you could do it within a week.

Mr. FLAXER. No; that was not the question he asked. He asked could the list be compiled within a week and I said it could.

Mr. ARENS. The information is available to you?

Mr. FLAXER. Yes.

Mr. ARENS. But you have declined to produce it; is that correct?

Mr. FLAXER. I haven't produced them.

Mr. ARENS. Will you produce it pursuant to the order of the chairman of this session within 10 days from today?

Mr. FLAXER. I will have to take that under consideration.

Senator WATKINS. That is the order, and of course we will have to take whatever steps are necessary if at the end of the time you have not produced them.

The Subcommittee never received either of the membership lists in question (R. 71).[8]

At petitioner's trial, prior to the introduction of any evidence before the jury, the question of the "pertinency of the records sought" (R. 61) was inquired into at a preliminary hearing before the court in the absence of the jury (R. 30–61). Following this hearing, at which Mr. Arens testified in detail with respect to the information in the possession of the Subcommittee concerning petitioner, the UPWA, the Communist Party membership of the top officials of this union (including petitioner), and the fact that a substantial percentage of the members of the union were currently in the employ of the Federal Government (*supra*, pp. 8–9), the court ruled that it was "the view of the Court that the information sought [was] pertinent to the subject under inquiry by the committee" (R. 62). In reaching this conclusion, the

[8] At petitioner's trial, the defense introduced in evidence a copy of a letter, dated October 13, 1951 (eight days following petitioner's appearance before the Subcommittee), addressed by petitioner to Senator Watkins (R. 75). In this letter he repeated, *verbatim*, the text of the prepared statement he had read to the Subcommittee on October 5 (see *supra*, pp. 10–12) (R. 76–77). He further wrote (R. 77):

"During the time that has elapsed since the date of that hearing, I have again given due consideration to the committee's request for those membership lists and have come to no other conclusion than that given to you on October 5th, as quoted above; and, therefore, again reiterate my request that the committee withdraw its demand for the membership lists."

While, according to the defense's evidence, the foregoing letter was mailed to Senator Watkins (R. 75), Senator Watkins never received the letter (R. 74–75). Petitioner himself did not take the stand at his trial.

court adverted to the terms of Senate Resolution 366, the nature of the Communist Party as being "not like other political parties in its utilization of positions of union leadership," and to the "common knowledge" that Communists "utilize positions of power in labor organizations * * * for purposes that are not necessarily those of union interests but rather for the promotion of the objects of the communist party" (R. 61–62).

Following this preliminary determination of pertinency by the court, the jury was recalled (R. 62) and the trial proceeded with the adduction of evidence of petitioner's refusal to produce the subpoenaed membership lists (R. 62–72).

SUMMARY OF ARGUMENT

In Points I–III, we show that Congress validly empowered the Senate Internal Security Subcommittee to compel production of the membership lists. In Points IV–VII, we discuss the validity of the procedures followed at the hearing itself.

I

The resolution establishing the Senate Subcommittee on Internal Security is sufficiently definite to support the Subcommittee's use of compulsory process.

1. Petitioner's contention that the resolution is not sufficiently definite assumes that this Court, in *Watkins* v. *United States*, 354 U. S. 178, invalidated the resolution establishing the House Committee on Un-American Activities as too vague to support the use

by the Committee of compulsory process. But it is clear from a number of considerations that *Watkins*, while it was critical of that resolution, did not hold it to be invalid. Such a holding would have been so far-reaching in its results that the Court would certainly have made it explicit and not have left the matter to inference. Also, if such had been the Court's holding, the extended discussion in the opinion relating to such matters as the pertinency of the specific questions put to Watkins and the necessity that a witness be apprised on demand of the basis of pertinency of the questions propounded would have been superfluous. Furthermore, the *Barenblatt* case, which involved the same resolution, would have been *reversed* rather than "remanded for consideration in light of" *Watkins*, had such been the Court's holding. And Mr. Justice Frankfurter's concurring opinion in *Watkins*—stating his understanding of the Court's holding—does not at all indicate the holding to have been so broad.

2. In any event, the resolution establishing the Senate Subcommittee on Internal Security is valid even if the House Committee's authorizing resolution is not, since the former is considerably more precise than the latter. The first two clauses of the Senate resolution—authorizing the Senate Subcommittee to carry on a continuing study and investigation of the administration of the Internal Security Act of 1950 and other laws relating to the internal security of the United States—clearly are not subject to the criticism of the House resolution found in the *Watkins* opinion, as petitioner recognizes by his failure seriously to dispute the point. The third clause—directing the

making of a continuing study of the extent, nature, and effects of "subversive activities" in the United States, "including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement * * *"—does not include either the term "un-American" or the phrase "principle of the form of government as guaranteed by our Constitution," criticized as indefinite by this Court in *Watkins*. In its context the term "subversive activities" is not without defined content, and the "including, but not limited to" clause does not render the whole clause unacceptably vague in view of the rule of statutory construction that the meaning of general language is to be confined to things of the same general class as those specifically enumerated.

Since the strict standards of definiteness applicable to criminal statutes are inapplicable to resolutions establishing congressional committees, and since the resolution here in issue compares favorably from the standpoint of definiteness with the resolutions establishing other committees of the Congress, petitioner's challenge to the validity of the present resolution cannot be sustained.

II

The Subcommittee's investigation of petitioner's union, with a view to ascertaining the extent to which it had been infiltrated by members of the Communist Party, had a valid legislative purpose.

1. *Watkins* did not overturn the established principle that committees of Congress are normally pre-

sumed to act pursuant to a valid legislative purpose when conducting investigations within the range of their constitutional powers. And *Watkins* recognized and reaffirmed the principle that congressional committees have the right to inquire into private matters when carrying out a proper investigation pursuant to such purpose. Its relevant teaching is simply that the compulsory disclosure by an unwilling witness before a congressional committee of private matters will not be sanctioned where it appears that the inquiry has no legislative purpose or the mere semblance of such a purpose.

2. Here, the public need for the information which petitioner withheld overwhelmingly overbalanced the private rights allegedly affected. The Subcommittee had information that petitioner's union was penetrated at the top by members of the Communist Party and that its top leader—petitioner himself—was a "hard core member" of the Party. Thus the union was, or very possibly was, a "Communist-front organization" as defined by the Internal Security Act of 1950—the administration and enforcement of which was the Subcommittee's peculiar concern under its charter. There were also grounds for investigating whether substantial numbers of the union's members were members of the Communist Party. And since many of the members of the union were admittedly employees of the Federal Government, the committee had cause to inquire into the possibility that members of the union who were also members of the Communist Party were at that very time in the employ of the Federal Government. The committee's action in sub-

poenaing the membership records of the union was a reasonable and logical step in its investigative process.

3. That Congress had a keen and continuing interest at the time here relevant (October 1951) in informing itself with respect to whether members of the Communist Party held positions of trust and influence in the Federal Government and in the enactment of legislation dealing with such employment is not subject to doubt. Cf. Section 9A of the Hatch Act (5 U. S. C. 118j) and Sections 5 (a) (1) and 15 (c) of the Internal Security Act (50 U. S. C. 784 (a) (1), 794 (c)).

4. That Congress, through its appropriate committees, has the *power* to inquire into the subjects of Communism and the Communist Party as an adjunct to its power to legislate with respect thereto, is equally undeniable. Since Congress unquestionably has this power, the courts have repeatedly upheld congressional inquiries into Communist leadership and infiltration of organizations and industries far less intimately connected with the Federal Government and the nation's security than petitioner's union appeared to have been at the time here in issue. Nor does the fact that the inquiry goes into the names of individuals invalidate it, since "personnel is part of the subject" (*Barsky* v. *United States,* 167 F. 2d 241, 246 (C. A. D. C.), certiorari denied, 334 U. S. 843). Communist leadership and infiltration of a union having among its members a substantial number of Federal employees would be a matter of far graver concern to the Congress than mere inefficiency or even malfeasance in the administration of the affairs of the

Federal Government—a matter with which Congress has always had a deep and abiding concern, the legitimacy of which has never been questioned.

While it is not essential to show that legislation has actually been recommended by a committee to prove that it has been pursuing a valid legislative purpose, the fact that legislation was proposed as a result of the investigation goes far toward establishing the existence of such a purpose. As a direct result of the 1951 investigations of labor unions, including that of petitioner's union, the Internal Security Subcommittee recommended and Congress ultimately passed the Communist Control Act of 1954—one provision of which amended the Internal Security Act of 1950 so as to deny to any labor organization found by the Subversive Activities Control Board to be "Communist-infiltrated" (as therein defined) all rights and benefits which it might otherwise enjoy under the National Labor Relations Act.

III

The membership lists were in fact pertinent to the inquiry.

1. The names of the members of petitioner's union, which the subpoena called for, were pertinent to the subject of the Subcommittee's inquiry since they could be used to check against the names of persons known or believed to be members of the Communist Party to determine the extent of Communist infiltration into the union. That the subject of the inquiry was Communist infiltration of the union is manifest from the entire tenor of the questions which the Subcommittee asked, and was known to petitioner, who made no ob-

jection on grounds of pertinency. It is unimportant that the committee did not formally state for the record how it proposed to use the membership list, since the committee was never asked by petitioner to elucidate its purpose in demanding the list. It is sufficient if it could reasonably have been the committee's purpose to use the list as a check list. The results of the committee's inquiry into the names of the members of the union in order to ascertain the extent of Communist infiltration would bear directly on the kind of remedial legislation, if any, which the committee would ultimately propose.

2. The same considerations which warranted the committee in inquiring into whether Federal-employee members of petitioner's union were members of the Communist Party—*viz.*, its concern over the possibility of there still being Communists in the Federal Government and the threat to the nation's security which would thereby be posed—also justified it in inquiring into whether the state- and municipal-employee members of the union were Party members. See Article IV, Section 4, of the Constitution (requiring the United States to guarantee to every State a republican form of government); Section 2 (15) of the Internal Security Act (50 U. S. C. 781 (15)); *Pennsylvania* v. *Nelson*, 350 U. S. 497, 505 (recognizing seditious conduct against the states as a matter of "vital national concern").

3. *National Assn. for the Advancement of Colored People* v. *Alabama*, 357 U. S. 449, presents only surface similarities to this case. The decisive aspect of that case was the utter absence of a showing of any

public need for the disclosure of the names of the members of the N. A. A. C. P. resident in Alabama. Here, the public end which was sought to be served by the demand for the membership list of petitioner's union is clear, and outweighed the members' interest in preserving their anonymity.

IV

The Subcommittee acted with a duly authorized quorum since Senator Watkins' admitted power to conduct the hearing and take petitioner's testimony necessarily included the power to rule upon petitioner's objections to production of the subpoenaed records.

1. Senator Watkins was not a one-member subcommittee of the Internal Security Subcommittee, *i. e.*, he was not a subcommittee of the Subcommittee. He was, for the purpose of conducting the hearing and taking testimony, a one-man quorum of the Internal Security Subcommittee itself. The problem, therefore, is not one of ascertaining the scope of a "charter" of a "one-member subcommittee" of a Subcommittee, but simply to give a sensible meaning to a committee resolution providing that a single member of the committee will constitute a quorum for a specific purpose, *viz.*, "for the purpose of taking sworn testimony."

2. The legislative history of the pertinent resolution (S. Res. 180, 81st Cong., 2d sess., amending Senate Standing Rule XXV (3)) supports our interpretation of the Rule as permitting a one-member quorum

of a committee to rule upon a witness' objections to producing subpoenaed documents. That history indicates that the amendment was designed to permit less-than-normal quorums of committees to *conduct hearings*. Reasonably construed, and in the light of this legislative history, the power which was lodged in Senator Watkins as a one-member quorum of the Subcommittee to "take sworn testimony" included the power to receive subpoenaed documents as a power incidental and normally ancillary to the taking of testimony. And his power to receive such documents included the authority to pass upon objections to their production, for the same reason that his power to take oral testimony included the power to pass upon objections to the requiring of such testimony.

If, contrary to our contention, it was the intent of the Senate to have the full Subcommittee pass upon a witness' objections to producing subpoenaed records, petitioner failed properly to raise the issue of the absence of a quorum to rule upon his objections, with the consequence—see *United States* v. *Bryan*, 339 U. S. 323, 332–334—that the point was waived and was not available to petitioner at his trial. For, while petitioner raised a point of "no quorum" at the outset of his appearance before the Subcommittee (which was overruled, and properly so, as petitioner does not dispute), he made no distinction between a quorum for the purpose of taking testimony and a quorum for the purpose of ruling upon his objection to the production of the subpoenaed records. In short, if petitioner is correct that there is such a distinction, he

failed to object to the absence of a quorum in the manner which *his* interpretation of the Resolution would require.

3. There is no danger of abuse if the Senate Rules are construed as authorizing one-man committee quorums to pass upon a witness' objections to the production of subpoenaed records. Petitioner's objections were necessarily considered by the Subcommittee as a whole, by the parent Committee on the Judiciary, and indeed by the Senate itself before petitioner's contempt was certified to the United States Attorney for prosecution.

V

The fact that petitioner was not in terms informed of the basis of pertinency of the records demanded is immaterial since he made no objection on grounds of pertinency.

The making of such objection is a necessary prerequisite to requiring the committee to explain the basis of pertinency. *Watkins* v. *United States,* 354 U. S. 178, 214–215. Petitioner never objected on grounds of pertinency. He objected on the ground that being required to produce the records would constitute an invasion of the union's and union members' right of privacy. But this was not equivalent to objecting on grounds of pertinency, any more than invoking one's privilege against self-incrimination is equivalent to objecting on grounds of pertinency. In each case the objection proceeds on the basis of an overriding constitutional right which it is claimed must be honored irrespective of pertinency, and indeed assumes pertinency.

Petitioner's statement that the records would be "wholly irrelevant, *if you say they are not to be made public*" did not, in its context, constitute an objection on grounds of pertinency. Certainly it was not such a clear-cut raising of the issue of pertinency as to require the Subcommittee, as a prerequisite to a successful contempt prosecution, to explain to petitioner in detail the logical nexus between the records sought and the subject of the inquiry.

In any event, the pertinency of the records had been made to appear with clarity. In these circumstances no explanation of the basis of pertinency was necessary under *Watkins* even if it be assumed, *arguendo*, that petitioner's objections included a challenge of the records' pertinency.

VI

Petitioner was clearly ordered to produce the subpoenaed records pursuant to the subpoena; his reliance on *Quinn* v. *United States*, 349 U. S. 155, 165–166, is, accordingly, misplaced.

1. The committee, after having been fully apprised by petitioner of his objections to producing the membership lists in accordance with the terms of the subpoena, directed him to "produce those records according to the terms of the subpena." The subsequent order to produce the records within ten days did not constitute rescission of the original order, but represented a fresh attempt on the part of the committee to obtain the records.

2. While it is unlikely that petitioner would have been cited for his contempt of October 5th (the date

of his appearance before the committee) if he had obeyed the committee's second order, that fact is immaterial. Obedience to the second order might be considered as acceptance by petitioner, in effect, of an opportunity, extended to him by the committee, to purge himself of his initial contempt. But since he did not accept such opportunity, there is no need to theorize as to what the legal effect would have been of compliance by petitioner with the second order.

3. Implicit in the jury's verdict, according to the instructions which it received, was a finding that petitioner knew he had been ordered to produce the records on October 5th and deliberately refused to do so. This finding on this issue must be accepted as dispositive.

VII

Since petitioner deliberately disabled himself from producing the membership lists by not bringing them to the hearing, thereby evidencing his intent not to produce them under any circumstances, he had, in any event, no standing at his trial to rely upon grounds for refusal to produce which were related solely to events occurring at the hearing. *United States* v. *Bryan*, 339 U. S. 323. The *Bryan* decision and other decisions of this Court stand for the proposition that a witness' objections to questions or to demands for production should be considered by the courts only where it appears that he would have answered the questions or produced the records but for those objections. But, even if, to petitioner's satisfaction, the full Subcommittee had been at the hearing (Point IV) and had fully explained to him

exactly how the lists were pertinent to the subject under inquiry (Point V) and had categorically directed that he deliver the subpoenaed lists then and there (Point VI), petitioner would still have refused to do so—indeed could not have done otherwise in view of his failure previously to equip himself—because, having regarded the demand as an "improper command," he had made up his mind in advance not to comply with this portion of the subpoena although he did comply with other portions of that subpoena. The principle of the *Bryan* case is therefore fatal to petitioner's present reliance on grounds having no relationship to the real basis for his refusal to obey the subpoena.

ARGUMENT

Introduction

Petitioner's contentions fall into two major categories. The first category relates to whether Congress validly empowered the Senate Internal Security Subcommittee to compel production of the membership lists. Encompassed in this class are the questions of whether: (I) the resolution delegating authority to the Subcommittee was sufficiently definite to support the Subcommittee's use of compulsory process; (II) the hearings had a valid legislative purpose; (III) the data sought was in fact pertinent to the inquiry. The second category relates to the procedures followed at the hearing itself. Involved here are the questions whether: (IV) the Subcommittee acted with a duly authorized quorum; (V) the petitioner, who made no objection on grounds of pertinency, may complain of the failure specifically to inform him

of the basis of pertinency; (VI) the Subcommittee directed the witness to comply forthwith "according to the terms of the subpoena". In discussing this second category of contentions, we note (Point VII) that petitioner had failed to bring the membership lists to the hearing as required by the subpoena and, therefore, had obviously determined, in advance of the hearing and regardless of what was said or done at the hearing itself, to defy the Subcommittee, and urge that he therefore lacked standing to complain of events which were not the true basis for his refusal to comply. We submit, in sum, that the petitioner was accorded all the procedural protections to which he was entitled and that his contentions are without merit.

I. The Resolution establishing the Senate Subcommittee on Internal Security is sufficiently definite to support the Subcommittee's use of compulsory process

Petitioner urges (Br. 38–43) that "the resolution establishing the Senate Subcommittee on Internal Security is too vague to support a conviction for contempt" (Br. 38). This contention is based on the suppositions (1) that this Court, in *Watkins* v. *United States*, 354 U. S. 178, struck down the resolution establishing the House Committee on Un-American Activities as "too broad and nebulous to support committee use of compulsory process" (Br. 38), and (2) that the resolution establishing the Senate Subcommittee on Internal Security—Senate Resolution 366, 81st Cong., 2d sess. (Appendix, *infra*, pp. 85–87)—is no more precise than the House Committee's resolution. Neither supposition is correct.

1. That the *Watkins* decision did not invalidate the resolution establishing the House Committee on Un-American Activities as too vague to support committee use of compulsory process is manifest, we submit, from a reading of the opinion.

The reasons why it is apparent that this Court did not invalidate the resolution are set forth in *Barenblatt* v. *United States*, 252 F. 2d 129, 131 (C. A. D. C.), pending on certiorari, No. 35, this Term. (See the Brief for the United States in No. 35, at pp. 32–34.) It is there noted (at 131) that if this Court in *Watkins* "had intended to strike down the resolution [creating the House Committee on Un-American Activities], it would have said so in so many words. It would not have left so vital an issue to inference or interpretation." For "[t]he far-reaching result of such a holding would be that the Committee, established by action of the entire House of Representatives, would be rendered helpless and would not even be able to summon a witness, much less have him testify" (*ibid.*). And "nowhere in the Watkins opinion does the Court use language essential to effectuate [such a] result * * *" (*ibid.*). Moreover, had this Court "struck down the resolution creating the Committee the matter would have been ended, without the further, extended discussion found in Watkins" (*ibid.*).

Furthermore, as *Barenblatt* also observes, this Court "cited in Watkins a number of cases, both in [this] Court and in Courts of Appeals, bearing on convictions sustained under the same resolution," without any intimation that such cases should have been or could have been "decided by the simple process of

voiding the resolution establishing the Committee"[9] (252 F. 2d at 132). And "* * * it is reasonable to assume that, had the resolution under which both Watkins and Barenblatt were questioned been stricken in its entirety, this case [*i. e., Barenblatt*] would have been *reversed* on authority of Watkins rather than *remanded* for consideration 'in light of' that opinion" (252 F. 2d at 132; emphasis in the original).

Finally, we note that Mr. Justice Frankfurter's concurring opinion in *Watkins* (354 U. S. at 216–217)—stating his understanding of the Court's opinion, in which he joined—does not indicate the holding to be that the Committee's charter was void or wholly incapable of supporting a contempt conviction.

2. In any event, the resolution establishing the Senate Subcommittee on Internal Security—Senate Resolution 366, 81st Cong., 2d sess. (Appendix, *infra*, pp. 85–87)—is considerably more precise than the resolution creating the House Committee on Un-American Activities which the Court criticized in *Watkins*.

Clauses (1) and (2) of the Senate resolution authorize and direct the Subcommittee to make a "complete and continuing study and investigation" of the "administration, operation, and enforcement of," respectively, "the Internal Security Act of 1950" and "other laws relating to espionage, sabotage, and the

[9] See, *e. g.*, *Quinn* v. *United States*, 349 U. S. 155; *Emspak* v. *United States*, 349 U. S. 190; *Bart* v. *United States*, 349 U. S. 219; *Barsky* v. *United States*, 167 F. 2d 241 (C. A. D. C.), certiorari denied, 334 U. S. 843; *United States* v. *Josephson*, 165 F. 2d 82 (C. A. 2), certiorari denied, 333 U. S. 838 (cited in *Watkins*, 354 U. S. at 196, 197, 200, 202, 203, 209).

protection of the internal security of the United States." The area of the Subcommittee's investigative authority thus delineated is certainly sufficiently definite to serve as a valid congressional resolution, and petitioner, significantly, does not seriously dispute the point (Br. 40). "Bare recital of this portion of the resolution," as the court below observed in *Sacher* v. *United States*, 252 F. 2d 828, 832 (C. A. D. C.), reversed on other grounds, 356 U. S. 576, "discloses that it is not subject to the same criticism as was directed at the House Resolution under which Watkins was questioned. It sufficiently describes 'the kind of investigation that the committee was directed to make.'"

Clause (3) of the resolution authorizes and directs the Subcommittee to make a complete and continuing study of—

> (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence.

It is to be noted immediately that this clause, which is the particular target of petitioner's criticism (Br. 40–41), does not include either the term "un-American" or the phrase "principle of the form of government as guaranteed by our Constitution"—whose indefiniteness this Court alluded to in *Watkins* (354

U. S. at 202). The only real point of similarity between the House resolution criticized in *Watkins* and this clause of the Senate resolution is the use in each of the word "subversive," and petitioner virtually concedes that the validity or invalidity of his challenge of the Senate resolution hinges on the single phrase "subversive activities" in this clause (Br. 41).

It is submitted, however, that the setting and context in which this phrase is used in this clause of the Senate resolution give it a more defined and specific content than the term "subversive * * * propaganda" has on the face of the House resolution. Coming as it does immediately after the reference in clause (1) to the "Internal Security Act of 1950"—the first Title of which is denominated the "Subversive Activities Control Act of 1950" (§ 1 (a), 64 Stat. 987) and which establishes a quasi-judicial agency designated as the "Subversive Activities Control Board" with important functions related to the subject matter of that Title (§ 12, 64 Stat. 997)—the term "subversive activities" in clause (3) can hardly be said to be a term utterly without defined content. To be sure, the term is qualified by the phrase "including, but not limited to"—the intended effect of which was to expand the concept of "subversive activities" somewhat beyond the confines of the specific subjects itemized following the phrase. This Court has, however, held that in congressional resolutions "[t]he meaning of the general language employed is to be confined to acts belonging to the same general class as those specifically authorized." *Reed* v. *County Commissioners*, 277 U. S. 376, 389. Applying this principle to the

third clause of Senate Resolution 366, the scope of the "subversive activities" referred to would, it would seem, be confined to activities at least of the "same general class" as "espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence."[10] Since these words and phrases have been used and their meaning described in numerous federal statutes (including the detailed legislative findings concerning the world Communist movement in Section 2 of the Internal Security Act (64 Stat. 987)), and because authorizing resolutions for legislative investigations have never been considered to require the narrow, defined language of a criminal statute (see *infra*, pp. 36–37), there is no basis, we believe, for holding that the third clause of the Senate resolution renders the resolution, which is otherwise certainly specific and definite enough, vulnerable to criticism on grounds of indefiniteness.

In any event, even if it be assumed, *arguendo*, that the term "subversive activities" in the third clause of

[10] In *Watkins*, this Court referred to the expression "subversion and subversive propaganda" (as orally used by the Chairman of the Subcommittee of the Committee on Un-American Activities there involved in announcing the subject of the Subcommittee's investigation) as "at least as broad and indefinite as the authorizing resolution of the Committee, if not more so" (354 U. S. at 214). But this phrase, unlike the phrase "subversive activities" in the authorizing resolution in the case at bar, lacked a contextual setting clothing it with meaning and content.

the Senate resolution is lacking in the specificity desirable in an enabling resolution, the clarity and specificity of the entire remainder of the resolution—particularly the first two clauses—leave no real doubt, as *Sacher, supra,* 252 F. 2d at 831–832, pointed out, of the area of authority conferred by that resolution on the Internal Security Subcommittee.[11]

The strict standards of definiteness applicable to criminal statutes, it is to be remembered, have never

[11] Petitioner contends (Pet. 24) that the court below, on remand, "switched its theory of the case so as to hold the subpoena sustainable under the first two clauses of the Subcommittee's charter, whereas it had previously relied on the third clause." There is, however, no merit to this contention, which is repeated in substance in petitioner's brief (Br. 27–28). The statement assumes (1) that Judge Miller's majority opinion, when the case was initially decided, relied solely on the third clause of Senate Resolution 366 (Appendix, *infra*, p. 86) as the Subcommittee's authorization for the inquiry it was engaged in when it issued the subpoena, and (2) that Judge Prettyman's opinion, following the remand, relies solely on the first two clauses of the resolution (Br. 27–28). Neither assumption is correct.

Judge Miller's opinion cited and relied upon all three clauses of the resolution as granting authority for the inquiry (R. 103). And the mere fact that Judge Prettyman's opinion, in mentioning that the Senate Resolution here involved "is more precise than the House Resolution criticized in *Watkins*" (R. 117), refers to *Sacher* v. *United States*, 252 F. 2d 828 (C. A. D. C.) (reversed on other grounds, 356 U. S. 576) (which—see pp. 831–832—found it necessary to consider only the first two clauses of the Senate Resolution) does not warrant petitioner's supposition (see Pet. 13; Br. 27–28) that Judge Prettyman, unlike Judge Miller, intended to rely solely on the first two clauses of the resolution. There is, in short, no sufficient reason to believe that the court below, both originally and on remand, did not look to Senate Resolution 366 in its entirety as the committee's authorization for the inquiry in which it was engaged when it subpoenaed the records here in issue.

been thought applicable to resolutions establishing congressional committees and defining their powers. The demarcation of the areas of authority of such committees is in the nature of things required to be stated in the most general of terms. If the resolution establishing the Senate Committee on Internal Security Committee is, as petitioner urges (Br. 41), fatally indefinite because of its employment of the phrase "subversive activities," then so, it would seem, are the authorizing resolutions—cast as they are in equally if not more indefinite terms—of the Committees on the Armed Services, Interstate and Foreign Commerce, and Appropriations, as well as the resolutions creating numerous select and special committees which have been established by Congress from time to time. See the dissenting opinion of Mr. Justice Clark in *Watkins*, 354 U. S. at 220–222. "Yet no one," as Mr. Justice Clark noted, "has suggested that the powers granted [these other committees] were too broad" (*id.*, p. 222).

II. The Subcommittee's investigation of petitioner's union, with a view to ascertaining the extent to which it had been infiltrated by members of the Communist Party, had a valid legislative purpose

Petitioner contends that the Subcommittee's investigation was not shown to be pursuant to a valid legislative purpose but was an unwarranted intrusion into the privacy of the union members—a contention which none of the judges of the court below accepted. We recognize that the power of Congress to conduct investigations, which "is inherent in the legislative process", is "broad" but "not unlimited" (*Watkins*, 354

U. S. at 187), and submit that the inquiry here conducted was well within that power.[12]

1. Because of the great importance of Congress' thoroughly informing itself before enacting legislation, this Court has upheld the power of Congress to conduct investigations pursuant to a valid legislative purpose, even though the investigation may relate to the private or personal affairs of the witness under interrogation. *Sinclair* v. *United States*, 279 U. S. 263, 294. In addition, this Court has firmly established the presumption that committees of Congress, as a coordinate body of the Federal Government, are acting pursuant to such a valid legislative purpose when conducting investigations within the range of their constitutional powers. *In re Chapman*, 166 U. S. 661, 669–671; *McGrain* v. *Daugherty*, 273 U. S. 135, 178; *Sinclair* v. *United States*, *supra*, 279 U. S. at 295.[13] See also Fleischmann, *Watkins* v. *United States*

[12] Petitioner states that "[i]n *Watkins*, the Court set aside for lack of a legislative purpose an attempted invasion of the privacy of a few former members of the Communist Party, whom the witness had refused to name" (Br. 22). This, however, is a misstatement of the *Watkins* holding. The holding of that case was, not that there was no valid legislative purpose, but that the committee had erroneously failed to apprise the witness, upon the latter's objection on grounds of pertinency, "what the topic under inquiry" was (this not having been "made to appear with undisputable clarity") and "the connective reasoning whereby the precise questions asked relate[d] to it" (354 U. S. at 208–215). See *infra*, pp. 69–71.

[13] To the extent that *Kilbourn* v. *Thompson*, 103 U. S. 168, is inconsistent with these later cases, its authority has been eroded by the latter. See *United States* v. *Rumely*, 345 U. S. 41, 46, and the criticisms of *Kilbourn* v. *Thompson* therein cited. In *Watkins* v. *United States*, 354 U. S. 178, the *Kilbourn* case was cited merely for its historical value (*id.*, at 194) and for the

and Congressional Power of Investigation, 9 Hastings L. J. 145, 149–150 (1958). On the basis of these cases, the lower federal courts have summarized the present posture of the law in the following terms: "[W]hen the general subject of investigation is one concerning which Congress can legislate, and when the information sought might aid the congressional consideration, a legitimate legislative purpose must be presumed." *United States* v. *Orman,* 207 F. 2d 148, 157 (C. A. 3). Accord, *Townsend* v. *United States,* 95 F. 2d 352, 361 (C. A. D. C.), certiorari denied, 303 U. S. 664; *Morford* v. *United States,* 176 F. 2d 54, 58 (C. A. D. C.), reversed on other grounds, 339 U. S. 258; *United States* v. *Kamin,* 136 F. Supp. 791, 803 (D. Mass.).

These principles were not overturned but on the contrary were substantially reaffirmed by this Court in *Watkins* v. *United States,* 354 U. S. 178. There, the Court restated the generally accepted principles that an investigation cannot be "an end in itself" without any relation to "a legitimate task of the Congress" (*id.,* at 187) and that "there is no congressional power to expose for the sake of exposure" (*id.,* at 200). Nonetheless, this Court indicated that congressional committees could sometimes inquire into private matters, noting only two exceptions: first, the situation discussed in *Kilbourn* v. *Thompson, supra,* 103 U. S. 168, which "teaches that such an investigation into individual affairs is invalid if unrelated to *any* legislative purpose" (emphasis added), and second, that

unexceptionable proposition that "an investigation into individual affairs is invalid if unrelated to any legislative purpose" (*id.,* at 198).

of *United States* v. *Rumely*, 345 U. S. 41, which "makes it plain that the *mere semblance* of legislative purpose would not justify an inquiry in the face of the Bill of Rights" (354 U. S. at 198; emphasis added). It was on the basis of these two exceptions that this Court said, of the presumption of a valid legislative purpose (*ibid.*):

> The critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness. We cannot simply assume, however, that every congressional investigation is justified by a public need that overbalances any private rights affected.

2. Applying these standards to the facts in the instant case, the Government contends that the public need overwhelmingly overbalanced the private rights allegedly affected. The only private interest which petitioner asserts is "that labor unions should not be required to divulge the names of their members" (Pet. 17; Br. 22) and his completely unsubstantiated suggestion that the list would be used for "blacklisting" (Pet. 25; Br. 20).[14] Valuable as may be the interest

[14] In *Morford* v. *United States*, *supra*, 176 F. 2d at 58, the appellant claimed more clearly than in the present case that the committee's request for disclosure of the names of participants in and contributors to the National Council of American-Soviet Friendship was for the purpose of adding the names to the committee's "blacklist" and destroying the organization's effectiveness. The claim was rejected on the ground that "a legitimate legislative purpose is presumed * * *" (*ibid.*). Other attempts to impugn the motives of members of committees have also been rejected for the same reason. *E.g.*, *Eisler* v. *United States*, 170 F. 2d 273, 278–279 (C. A. D. C.), certiorari dismissed, 338 U. S. 883. And in *Watkins*, this Court stated (354 U. S. at 200):

of a union in keeping secret the names of its members, it certainly does not, by itself, rise to the stature of the First Amendment right considered in *United States* v. *Rumely*, 345 U. S. 41. On the other hand, the public interest here goes far beyond the "mere semblance of legislative purpose" which this Court found present in *Rumely*.

Before petitioner was subpoenaed, the Subcommittee, as we have seen (*supra*, pp. 8–9), had information that the UPWA, of which petitioner was the National President, was an organization of between 35,000 and 50,000 members who were employed in "various governmental agencies" throughout the country, including the Federal Government; that the chief national officer of this union—petitioner—was not only a member of the Communist Party but a "tried fanatic," or "hard core member," of that Party; that Ewart Guinier, the union's secretary-treasurer and co-leader with petitioner at the national level, was also a Communist Party member; that a man who had in the recent past been the union's negotiations director was likewise a Communist Party member, as were also "certain of the members of the executive board." In short, the Subcommittee had information that petitioner's union, substantial numbers of whose members were then in the employ of the Federal Gov-

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"We have no doubt that there is no congressional power to expose for the sake of exposure. * * * But a solution to our problem is not to be found in testing the motives of committee members for this purpose. Such is not our function. Their motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served [footnote reference omitted]."

ernment, was penetrated at the top by members of the Communist Party and that its highest leader—petitioner himself—was a "hard core member" of the Party.

If the committee's information was correct—and it was fully corroborated by many witnesses—it is evident that the UPWA was, or very possibly was, a "Communist-front organization" as defined by the Internal Security Act of 1950[15]—the administration, operation, and enforcement of which, by the express terms of the committee's charter, was its peculiar concern. It is also evident that, if the committee's information was correct, there were grounds for investigating whether substantial numbers of the union's then-current members were members of the Communist Party. And since many of the members of the union were at that time employees of the Federal Government, the committee manifestly had cause to inquire into the possibility that members of the union who were also members of the Communist Party were then in the employ of the Federal Government.

Petitioner's own testimony before the committee, moreover, significantly corroborated the committee's information regarding the substantiality of the number of the members of petitioner's union who were in

[15] Section 3 (4) of that Act (50 U. S. C. 782 (4)) defines a "Communist-front organization" as "any organization in the United States" other than a "Communist-action organization" which is "substantially directed, dominated, or controlled by a Communist-action organization" and is "primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement." For the definition of a "Communist-action organization," see Section 3 (3) (50 U. S. C. 782 (3)).

the employ of the Federal Government. He testified, as we have seen (*supra*, p. 12), that there were "about 35,000" members in his union, and that "about 5 percent" of these were Federal employees, the remaining 95 percent being in the employ of state, county, and municipal governments (R. 43). In other words, according to petitioner's own testimony, in the neighborhood of 1,750 persons, who were members of what the committee had reasonable grounds to believe from other sources had been deeply penetrated by and might well have been a "front" of the Communist Party, were currently in the employ of the Federal Government, with the remaining 33,000-odd being in the employ of state and local governments throughout the country.

In these circumstances, it is submitted, the action of the committee in subpoenaing the financial and membership records of this union was a reasonable and logical step in its investigative process in aid of its function of keeping the Congress informed in the field of its special jurisdiction and recommending appropriate remedial legislation where such seemed necessary.

3. That Congress had a keen and continuing interest at the time here relevant (October 1951) in informing itself with respect to whether members of the Communist Party held positions of trust and influence in the Federal Government and in the enactment of legislation dealing with such employment is, we take it, not subject to doubt. As long ago as 1939, Congress, in the Hatch Act, in a provision obviously aimed at members of the Communist Party among others, had

made it unlawful for any person employed in any capacity by any agency of the Federal Government to have membership in any political party or organization which advocates the overthrow of the constitutional form of government presently existing in the United States (Act of August 2, 1939, c. 410, § 9A, 53 Stat. 1148; 5 U. S. C. 118j). The Internal Security Act had been on the books for slightly over a year (Act of September 23, 1950, c. 1024, 64 Stat. 987, 50 U. S. C. 781 *ff.*). This Act contained a formal declaration by Congress that "[t]here exists a world Communist movement" consisting of a "world-wide revolutionary movement whose purpose it is, by treachery, deceit, *infiltration into other groups (governmental and otherwise)*, espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization" (§ 2 (1); 50 U. S. C. 781 (1); emphasis added). Declaring that the "Communist organization in the United States" presented "a clear and present danger to the security of the United States and to the existence of free American institutions" (§ 2 (15); 50 U. S. C. 781 (15)), it provided for proceedings before a Subversive Activities Control Board, which was to have the power, after the holding of hearings and the adduction of evidence, to order any organization found to be a "Communist-action" or "Communist-front" organization to register as such with the Attorney General (§ 13; 50 U. S. C. 792). When such an order had become final as de-

fined in the Act, after full opportunity for judicial review (§ 14; 50 U. S. C. 793), it became criminally punishable for any member of such organization, having knowledge or notice of the existence of such final order, to conceal or fail to disclose his membership in seeking, accepting, or holding any nonelective federal employment, or to hold such employment (§§ 5 (a) (1), 15 (c); 50 U. S. C. 784 (a) (1), 794 (c)). As we have seen, one of the principal functions and responsibilities of the Subcommittee—whence, indeed, it derives its name—was, under its charter, the making of a "complete and continuing study and investigation" of "the administration, operation, and enforcement of" this Act (S. Res. 366, 81st Cong., 2d sess.; Appendix, *infra*, p. 86).

4. That Congress, through its appropriate committees, has the *power* to inquire into the subjects of communism and the Communist Party as an adjunct to its power to legislate with respect thereto, is equally undeniable. See, *e. g.*, *American Communications Assn.* v. *Douds*, 339 U. S. 382; *Osman* v. *Douds*, 339 U. S. 846; *Galvan* v. *Press*, 347 U. S. 522; *Harisiades* v. *Shaughnessy*, 342 U. S. 580; *Carlson* v. *Landon*, 342 U. S. 524; *Adler* v. *Board of Education*, 342 U. S. 485; *Communist Party* v. *Subversive Activities Control Board*, 223 F. 2d 531 (C. A. D. C.), reversed on other grounds, 351 U. S. 115; cf. *Dennis* v. *United States*, 341 U. S. 494. It is likewise clear that the mere possibility that unconstitutional legislation will eventuate from an otherwise legitimate congressional inquiry cannot invalidate the inquiry itself. *Barsky*

v. *United States*, 167 F. 2d 241, 245 (C. A. D. C.), certiorari denied, 334 U. S. 843; *United States* v. *Josephson*, 165 F. 2d 82, 91–92 (C. A. 2), certiorari denied, 333 U. S. 838.[16] Since Congress unquestionably has this power, the lower federal courts have repeatedly upheld congressional inquiries into Communist leadership in and infiltration of organizations and industries far less intimately connected with the Federal Government and the nation's security than the United Public Workers appeared to have been at the time here in issue on the basis of the information in the possession of the committee. *United States* v. *Lattimore*, 215 F. 2d 847, 851 (C. A. D. C.); *Marshall* v. *United States*, 176 F. 2d 473, 474 (C. A. D. C.), certiorari denied, 339 U. S. 933; *Lawson* v. *United States*, 176 F. 2d 49, 53 (C. A. D. C.), certiorari denied, 339 U. S. 934; *Morford* v. *United States*, *supra*, 176 F. 2d at 57; *Barsky* v. *United States*, *supra*, 167 F. 2d at 246; *United States* v. *Josephson*, *supra*, 165 F. 2d at 89–90; *United States* v. *Kamin*, *supra*, 136 F. Supp. at 801; *United States* v. *Bryan*, 72 F. Supp. 58, 62 (D. D. C.), reversed on other grounds, 174 F. 2d 525 (C. A. D. C.), reversed, 339 U. S. 323.

Nor does the fact that the inquiry goes into the question of names of individuals invalidate it. "If Congress has power to inquire into the subjects of Communism and the Communist Party," as was aptly observed in the *Barsky* case, *supra*, 167 F. 2d at 246—

[16] "Obviously, the possibility that invalid as well as valid legislation might ensue from an inquiry does not limit the power of inquiry; invalid legislation might ensue from any inquiry" (*Barsky*, 167 F. 2d at 245).

> it has power to identify the individuals who believe in Communism and those who belong to the party. The nature and scope of the program and activities depend in large measure upon the character and number of their adherents. *Personnel is part of the subject.* [Emphasis added.] [17]

Or, as the court below in its original opinion in the instant case put it, "the names of members were pertinent because an investigation of the union was pertinent" (R. 104).

It is manifest that Communist leadership in and infiltration of a union having among its members a substantial number of Federal employees would be a matter of far graver concern to the Congress than mere inefficiency or even malfeasance in the administration of the affairs of the Federal Government—a matter with which Congress has always had a deep and abiding concern, the legitimacy of which has never been questioned. See *Watkins* v. *United States, supra,* 354 U. S. at 200, n. 33; *McGrain* v. *Daugherty, supra,* 273 U. S. at 177–178; Landis, *Constitutional Limitations on the Congressional Power of Investigation,* 40 Harv. L. Rev. 153, 194 (1926); cf. *Sinclair* v. *United States, supra,* 279 U. S. at 294, 297. As this Court noted in *American Communications Assn.* v. *Douds,* 339 U. S. 382, 388–389 (upholding the valid-

[17] Quoted with approval in *Barenblatt* v. *United States,* 240 F. 2d 875, 884 (C. A. D. C.), reversed and remanded on other grounds, 354 U. S. 930. The subsequent reaffirmance of Barenblatt's conviction is pending on certiorari as No. 35, this Term. Our brief in No. 35 contains a further discussion of congressional investigations into communism and the Communist Party—to which the Court is respectfully referred.

ity of the non-Communist oath provision (§ 9 (h)) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947, 29 U. S. C. 159 (h)):

> Substantial amounts of evidence were presented to various committees of Congress * * * that Communist leaders of labor unions had in the past and would continue in the future to subordinate legitimate trade union objectives to obstructive strikes when dictated by Party leaders, often in support of the policies of a foreign government. And other evidence supports the view that some union leaders who hold to a belief in violent overthrow of the Government for reasons other than loyalty to the Communist Party likewise regard strikes and other forms of direct action designed to serve ultimate revolutionary goals as the primary objectives of labor unions which they control. * * * It is sufficient to say that Congress had a great mass of material before it which tended to show that Communists and others proscribed by the statute had infiltrated union organizations not to support and further trade union objectives * * * but to make them a device by which commerce and industry might be disrupted when the dictates of political policy required such action.

Since the Subcommittee, before subpoenaing petitioner, had convincing information tending to indicate complete Communist Party domination and control of the union of which he was president (see *supra*, pp. 8–9), it could reasonably have concluded that the Communist leadership might some day attempt to use the

union for its own ends—whether for a "political strike" or some other form of "direct action designed to serve ultimate revolutionary goals" (*Douds, supra,* at 388). And because the National Labor Relations Act—and therefore its non-Communist affidavit clause (see R. 44–45)—does not apply to a union representing Federal and state employees (29 U. S. C. 152 (2), (3), and (5)), the Subcommittee could well have considered that additional legislation might be needed with respect to Communist domination of this union. At the very least, Congress, through its appropriate committees, of which this Subcommittee was certainly one, had the authority to examine into the situation by a thorough investigation.

Both the authorizing resolution and subsequent history of the Subcommittee, moreover, strongly support the Government's contention that the investigation here was being conducted pursuant to a valid legislative purpose. The first two clauses of the resolution, discussed *supra,* pp. 32–33, show clearly that the Subcommittee was created for the primary purpose of studying and investigating "the administration, operation, and enforcement of" the "Internal Security Act of 1950" and "other laws relating to espionage, sabotage, and the protection of the internal security of the United States" (Appendix, *infra,* p. 86). While such a clear statement of legislative purpose is not required (*In re Chapman,* 166 U. S. 661, 669–670; *McGrain* v. *Daugherty,* 273 U. S. 135, 177–178), it supports and fortifies the presumption that the Subcommittee was pursuing such a purpose.

Similarly, it is, of course, not essential to show that legislation has actually been recommended by a committee to prove that it has been pursuing a valid legislative purpose. *United States* v. *Josephson, supra,* 165 F. 2d at 89–90; *Townsend* v. *United States, supra,* 95 F. 2d at 355. The committee might well find, as a result of its investigation, that no legislation is required or even that existing legislation is unnecessary. See Landis, *Constitutional Limitations on the Congressional Power of Investigation,* 40 Harv. L. Rev. 153, 208–209, 217–218 (1926). On the other hand, the fact that legislation was proposed as a result of the investigation goes far toward establishing a valid legislative purpose. See *Barsky* v. *United States, supra,* 167 F. 2d at 245.. As a direct result of the 1951 investigations of labor unions, including that of the UPWA, the Internal Security Subcommittee recommended and Congress ultimately passed the Communist Control Act of 1954, c. 886, 68 Stat. 775. See S. Rept. No. 1709, 83d Cong., 2d sess., p. 2; Annual Report of the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws to the Committee on the Judiciary, United States Senate, 83d Cong., 2d sess., for the Year 1954, pp. 2–4.[18] This Act amended the

[18] Another proposed statute which was recommended in 1954 by the Subcommittee and the full Judiciary Committee as a result of the labor union investigations would have allowed an employer to discharge an employee who is a member of a subversive organization without being held accountable for an unfair labor practice. See the Subcommittee's 1954 Annual Report (cited in text above), p. 3. Each of the Subcommittee's annual reports indicates that the Subcommittee does not "expose for

Internal Security Act of 1950 so as to deny to any labor organization found by the Subversive Activities Control Board to be either a Communist-action organization, a Communist-front organization, or a "Communist-infiltrated" organization (as therein defined) all rights, privileges, and benefits which it might otherwise enjoy under the National Labor Relations Act. See 50 U. S. C. (Supp. V) 792a (h)."[19] (The fact that the U. P. W. A. is not covered by the National Labor Relations Act [see p. 49, *supra*] does not detract from the fact that the Subcommittee's inquiry into labor unions generally had a valid legislative purpose.)

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the sake of exposure" but rather investigates pursuant to its constant consideration of proposed legislation. See, *e. g.*, its Annual Report to the Committee on the Judiciary, 85th Cong., 1st sess., for the Year 1957, pp. 16–18.

[19] The definition of a "Communist-infiltrated" organization is set forth in Section 3 (4A) of the Internal Security Act as amended by the Communist Control Act (50 U. S. C. (Supp. V) 782 (4A)). A proviso in the definition states that "any labor organization which is an affiliate in good standing of a national federation or other labor organization whose policies and activities have been directed to opposing Communist organizations, any Communist foreign government, or the world Communist movement, shall be presumed prima facie not to be a 'Communist-infiltrated organization' ". The UPWA, it is significant to note, was expelled from the C. I. O. in 1950 following a finding by that body that it was Communist-dominated (Hearings before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, United States Senate, 82d Cong., 1st sess., on *Subversive Control of the United Public Workers of America*, Part I, July 27, August 9, 23, 25 and 29, September 28, October 5 and 10, December 14, 1951, pp. 27–28).

III. The membership lists in fact were pertinent to the inquiry

1. The names of the members of petitioner's union, which the subpoena called for, were clearly pertinent to the subject of the Subcommittee's inquiry—the extent of the Communist Party's infiltration into the union. As observed in the Court of Appeals' initial opinion (R. 104):

> The names could be used to check against a list of subversives to determine the extent of infiltration into the union, a matter clearly pertinent under the Resolution, particularly since this is a Government employees' union even though the names of state and local members are included. Regardless of where they were employed, the names of members were pertinent because an investigation of the union was pertinent.

Petitioner criticizes this reasoning by saying that there is "no evidence" that the subject of the inquiry was Communist infiltration of the union, or that the purpose of the demand was to check the names of union members against a "master list of 'subversives'," or that the committee had such a list (Br. 29).

That the subject of the inquiry was Communist infiltration of the union, however, is manifest from the entire tenor of the questions which the Subcommittee asked petitioner (*supra*, pp. 12–15), particularly when viewed in the light of the background information concerning petitioner and his union which the committee had received prior to subpoenaing him (*supra*, pp. 8–9). The subject matter of the inquiry in fact appeared with undisputable clarity, and, as we shall

show more fully below (Point V, *infra*, pp. 68–75), was known to petitioner, who made no objection on grounds of pertinency.

It is unimportant that Senator Watkins did not formally state for the record that it was the committee's purpose to use the list of members as a check list in its investigation into the extent of Communist infiltration of the union, since he was never asked by petitioner to elucidate the committee's purpose in demanding the list—doubtless because petitioner understood the purpose very well.[20] It is sufficient if, as the court below indicated, this could reasonably have been the committee's purpose. Nor was it necessary for the committee to have had a "master list of 'subversives' " for the union membership list to have been useful to the committee in its inquiry. The court below said nothing about any such "master list." The term is petitioner's (Br. 29, 31). But the committee certainly had in its files, as a result of its prior investigations, names of persons who, there were at least grounds for believing, were members of the Communist Party. A reasonable step in the committee's inquiry into the extent of Communist penetration of the UPWA was to check against those names the

[20] Petitioner's assumption (Br. 20, 35–36) that Senator Watkins, by not formally and in so many words repudiating petitioner's charge that the purpose in subpoenaing the membership records was to use them as "blacklists," acknowledged that this was their purpose is manifestly unwarranted, and is refuted, furthermore, by the entire tenor of the Senator's statements during the course of petitioner's testimony (see, in particular, R. 48–49).

names of the members of the union.[21] The court below obviously meant no more than this, and petitioner's attempt to distort that meaning does not detract from the sensibleness of the procedure suggested.

That such a step in the investigatory process would be reasonable, particularly in view of the abundance of the evidence of the union's Communist leadership, finds support in the decisions of the courts as well as in logic. See, *e. g., United States* v. *Orman, supra,* 207 F. 2d at 154–155; *Townsend* v. *United States, supra,* 95 F. 2d at 361; *United States* v. *Deutch,* 147 F. Supp. 89, 92 (D. D. C.); *United States* v. *Bryan, supra,* 72 F. Supp. at 61.

The results of the committee's inquiry into the names of the members of the union in order to ascertain the extent of Communist infiltration would certainly bear directly on the kind of remedial legislation, if any, which the committee would ultimately propose. For example, if it appeared that the overwhelming majority of the union's members were non-Party members, remedial legislation designed to oust the Communists from positions of control might take the form of measures aimed primarily at improving intra-union democracy; if the situation proved to be otherwise, the legislation might require a different cast, as for example the imposition of special penalties or

[21] The mere recital of the number of persons involved would not, contrary to Judge Edgerton's suggestion (R. 113), have satisfied this purpose. Nor would it have enabled the Subcommittee to determine the importance and sensitivity of the government positions held by members of the UPWA.

disabilities on Communist-dominated and infiltrated unions in general.

2. Petitioner contends (Br. 23–26) that "the invalidity of the subpoena is aggravated by the demand for the names of state, county and municipal employees" (Br. 23). "In this case," it is argued, "the Subcommittee asserted power to inquire into the organizational affiliations of state and local government employees. This was not a field within which Congress could legislate, being within the reserved powers of the states, and therefore the inquiry was ultra vires" (Br. 24). The contention, we submit, is unsound.

The same considerations which warranted the committee in inquiring into whether Federal-employee members of petitioner's union were members of the Communist Party—*viz.*, its concern over the possibility of there still being Communists in the Federal Government and the threat to the nation's security which would thereby be posed—also justified it in inquiring into whether the state- and municipal-employee members of the union were Party members. Article IV, Section 4, of the Constitution requires that the United States guarantee to every State a republican form of government. This clause is for Congress to enforce. *Luther* v. *Borden*, 7 How. 1, 42–43; *Ohio* v. *Akron Park District*, 281 U. S. 74, 79–80. "This clause alone," as was observed in the *Barsky* case, *supra*, 167 F. 2d at 246, "would supply the authority for Congressional inquiry into potential threats to the republican forms of the governments of the States." And see *United States* v. *Josephson*,

supra, 165 F. 2d at 90. The Internal Security Act, moreover—the administration and enforcement of which, as we have seen, is the peculiar concern of this Subcommittee under its charter—in the introductory section referring to the need for the legislation, specifically cites (among other considerations) Congress' responsibility under this clause for "guarantee[ing] to each State a republican form of government" (§ 2 (15); 50 U. S. C. 781 (15)). And in *Pennsylvania* v. *Nelson,* 350 U. S. 497, 505, this Court, specifically noting this and kindred provisions of the Internal Security Act, observed that "Congress having thus treated seditious conduct as a matter of vital national concern, it is in no sense a local enforcement problem," and referred to the fact that Congress had "proscribed sedition against all government in the nation—national, state and local."

In the *Nelson* case this Court invalidated a state sedition statute—and in effect all such statutes—on the ground that Congress, by the Smith Act, had preempted the field. Since congressional legislation protecting state governments as well as the Federal Government from subversion and sedition is valid, it would follow *a fortiori* that Congress, through its appropriate committees, may conduct investigations in aid of legislation in this field.[22]

[22] Some federal courts have held that Congress may investigate matters exclusively within the jurisdiction of the states, provided the matters affect powers granted to the Federal government. *United States* v. *DiCarlo,* 102 F. Supp. 597, 602 (N. D. Ohio); *United States* v. *Bryan,* 72 F. Supp. 58, 61 (D. D. C.), reversed on other grounds, 174 F. 2d 525 (C. A. D. C.), reversed, 339 U. S. 323. And the courts, as we have seen,

3. *National Assn. for the Advancement of Colored People* v. *Alabama*, 357 U. S. 449, relied on by petitioner (Br. 30), presents only surface similarities to the case at bar. In substance it is clearly distinguishable. In that case this Court set aside a contempt judgment entered in an Alabama court against the N. A. A. C. P. for refusing to obey a production order compelling disclosure of its Alabama membership lists. This Court, pointing out that the N. A. A. C. P. was an association of individuals who had banded together to advocate, as it was their constitutional right to do, public and private controversial points of view and to foster common beliefs, held that it was an infringement of the Fourteenth Amendment for Alabama, by State action, to invade the privacy of the members' association by compelling public disclosure of the group's members, *in the absence of a showing of an overriding and proportionate public need for the disclosure*. It was the complete absence of such a showing on which the decision turned (see 357 U. S. at 463–466), and it is this factor which makes that case clearly distinguishable from this.

The Court emphasized in the *N. A. A. C. P.* case that "compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate" (at pp. 462–463). The Court then considered whether Alabama had "demonstrated

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supra, pp. 45–46, have refused to presume, merely because an investigation might conceivably result in unconstitutional legislation, that the investigation itself is void from the outset.

an interest in obtaining the disclosures * * * which is sufficient to justify the deterrent effect * * * on the free exercise by petitioner's members of their constitutionally protected right of association" (p. 463). It concluded that the State's purported justification—that the membership lists were necessary to ascertain whether the N. A. A. C. P. came within the scope of the State registration statute applying to intrastate business—was not "sufficient to overcome petitioner's constitutional objections" (p. 465), particularly in view of the Association's admitted presence in the State. Indeed, the Court said it was "unable to perceive that the disclosure of the names of [the Association's] rank-and-file members has a substantial bearing on" the issue (p. 464).

In contrast, for the reasons which we have previously set forth, the public interest of the Congress, acting through this Subcommittee, in obtaining the names of the members of petitioner's union outweighed their interest in preserving their anonymity and the privacy of their association. Cf. *United States* v. *Harriss*, 347 U. S. 612, 625–626. The *N. A. A. C. P.* case, therefore, gives no support to petitioner's position.[23]

* * * * *

Having demonstrated (Points I–III, *supra*) that the Subcommittee had been validly empowered to compel

[23] Two prior decisions of the court below have likewise upheld demands for the disclosure of the names of personnel of organizations under investigation. *Marshall* v. *United States*, *supra*, 176 F. 2d at 474; *Morford* v. *United States*, *supra*, 176 F. 2d at 57–58.

disclosure of the membership lists, we next consider whether the procedures followed at the Subcommittee hearing itself accorded petitioner all the protection to which he was entitled (Points IV–VI), noting the significant fact that petitioner, who failed to bring the lists with him to the hearing as required by the subpoena, had obviously determined in advance not to comply regardless of what took place at the hearing (Point VII).

* * * * *

IV. The Subcommittee acted with a duly authorized quorum, since Senator Watkins' admitted power to conduct the hearing and take petitioner's testimony necessarily included the power to rule upon petitioner's objections to production

When this case was decided originally by the court below, the fact that it was a "one-member" committee which heard and overruled petitioner's objection to the production of the subpoenaed records formed the sole basis of Judge Fahy's dissent. He dissented, he said, "on the ground that the Subcommittee had empowered a single member only to administer oaths and to take sworn testimony and this power was not broad enough to include authority in but one member to rule upon objections to the production of documents called for by a subpoena *duces tecum*" (R. 114)[24] On remand of the case for consideration in the light of *Watkins*, Judge Fahy, joined by Judges Edgerton and Bazelon, adhered to his prior view, which he thus explained (R. 119):

[24] Judges Edgerton and Bazelon were also of this view (see their separate dissenting opinion at R. 113). In addition, they dissented on a separate ground, which forms the subject of Point VI (*infra*, pp. 76–80).

> There [in *Watkins*] the Court was considering the question of the committee's authorized scope of inquiry as it bore upon the pertinency of questions asked a witness. But the force of *Watkins* cannot be confined to issues of pertinency. *Watkins* requires as well clarity and certainty in the delegation of whatever power is sought to be exercised to compel obedience by a witness on pain of punishment for crime for not obeying. In that light *Watkins* fortifies the basis of my previous dissent. The charter here was the resolution of the parent Subcommittee delegating specified authority to a one-member subcommittee. To repeat, this subcommittee, before whom appellant appeared, was given authority only to administer oaths and to take sworn testimony. Its charter is expressed only in those terms. The broader authority claimed is not to be implied. * * *

Petitioner adopts this argument of Judge Fahy's (Pet. 29; Br. 43–47).

Shortly following the creation of the Senate Internal Security Subcommittee, the Subcommittee—pursuant to the authority conferred by Section 2 of Senate Resolution 366 (Appendix, *infra*, pp. 86–87) and subsection 3 (b) of Rule XXV of the Standing Rules of the Senate, as amended (Appendix, *infra*, p. 87)—adopted a resolution to the effect that a single member would constitute a quorum for the purpose of taking testimony at hearings.

1. Senator Watkins, on the day in question, was not, therefore, as Judge Fahy assumes, a one-member subcommittee of the Internal Security Subcommittee. He was, for the purpose of conducting the hearing

and taking testimony, a one-man quorum of the Internal Security Subcommittee itself. Therefore it is inaccurate to refer to Senator Watkins' "charter" as a "one-member subcommittee" of the "parent Subcommittee [on Internal Security]." To repeat, Senator Watkins constituted a special-purpose quorum of the Internal Security Subcommittee itself. For that purpose, he "comprise[d] the subcommittee that day" (R. 37) and petitioner does not question Senator Watkins' authority to conduct that day's hearing and take petitioner's testimony. Cf. *Christoffel* v. *United States,* 338 U. S. 84, 88–89; *Watkins* v. *United States,* 354 U. S. 178, 200–201, 205.

The problem, therefore, is not one of ascertaining the scope of a "charter" of a "one-member subcommittee" of a Subcommittee. It is simply to give a sensible meaning to a committee resolution providing that a single member of the committee will constitute a quorum for a specific purpose, *viz.,* "for the purpose of taking sworn testimony" (Rule XXV (3) (b) of the Standing Rules of the Senate, as amended by S. Res. 180, 81st Cong., 2d sess.; Appendix, *infra,* p. 87).

2. The legislative history of Senate Resolution 180, 81st Cong., 2d sess.—which amended Senate Standing Rule XXV (3) by adding a second paragraph, (b), providing that each standing committee and each subcommittee of any such committee is authorized to fix a lesser number than one-third of its entire membership who shall constitute a quorum thereof for the purpose of taking sworn testimony (see Appendix, *infra,* p. 87)—supports our interpretation of the meaning of the paragraph. The committee report on

the resolution (S. Rept. No. 1208, 81st Cong., 2d sess.), after stating that it was occasioned by this Court's decision in the *Christoffel* case[28] and was intended to be "an adequate response to" that decision, points out that "[i]n the future a quorum of Senate standing committees and subcommittees *for hearings* will be fixed and made absolute" and that "this resolution, in addition to meeting the objections raised by the Christoffel decision, will facilitate the maintenance of committee quorums at *hearings*" (pp. 2, 3; emphasis added). Similarly, in explaining the resolution to the Senate, Senator Hayden, the Chairman of the Committee on Rules and Administration, which reported the resolution, said that it would allow "any committee" to "determine the size of the committee at *a hearing* * * *" (96 Cong. Rec. 1284; emphasis added). These statements make it clear, we believe, that the purpose of the provision was to amend the rule as it applies to *hearings* in general and that the words "taking sworn testimony" were not to be narrowly or restrictively construed.

Reasonably construed, and in the light of this legislative history, the power which was lodged in Senator Watkins as a one-member quorum of the Subcommittee to "tak[e] sworn testimony" clearly included the power to receive subpoenaed documents as a power incidental and normally ancillary to the taking of

[28] *Christoffel* v. *United States*, 338 U. S. 84 (holding that it was incumbent on the Government, in a prosecution for perjury before a congressional committee, to establish as part of its affirmative case that a quorum of the committee was present at the time of the giving of the allegedly perjurious testimony).

testimony. "[T]o give up facts possessed by physical control is no different from the giving up of data possessed as mental impressions" (8 Wigmore, *Evidence* (3d ed. 1940), § 2193). Similarly, the Eighth Circuit has held (*Brownson* v. *United States*, 32 F. 2d 844, 846–847), in interpreting a statute requiring persons "to give testimony or answer interrogatories," that:

> This testimonial duty to attend and disclose applies equally to the production of documents; and the process for documents will be implied wherever testimonial compulsion in general is predicated by a statute.

While law dictionaries have defined "testimony" so as to exclude written documents (see Pet. Br. 45), a large number of cases have held that this definition is a highly technical one, not in accord with normal usage.[26] And this Court has repeatedly said that "[s]tatutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and

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[26] See *e. g.*, *Crumley* v. *State*, 18 Ala. App. 105, 106, 89 So. 847, 848 (1921); *Mann* v. *Higgins*, 83 Cal. 66, 69, 23 Pac. 206, 207 (1890); *Talley* v. *State*, 160 Fla. 593, 600, 36 So. 2d 201, 205 (1948); *Hargrove* v. *State*, 117 Ga. 706, 707–708, 45 S. E. 58 (1903); *Donham* v. *Joyce*, 257 Ill. 112, 122, 100 N. E. 524, 527 (1912); *Welch* v. *Miller*, 32 Ill. App. 110, 112 (1889); *Jones* v. *Gregory*, 48 Ill. App. 228, 230 (1892); *Seaverns* v. *Lischinski*, 82 Ill. App. 298, 304 (1898); *In re Burcham's Estate*, 211 Iowa 1395, 1399, 235 N. W. 764, 766 (1931); *State* v. *Winney*, 21 N. D. 72, 74–75, 128 N. W. 680, 681 (1910); *Grayson* v. *Durant*, 43 Okla. 799, 804, 144 Pac. 592, 595 (1914); *Dial* v. *Gardner*, 104 S. C. 456, 461, 89 S. E. 396, 397 (1916); *Superior Lloyds of America* v. *Foxworth*, 178 S. W. 2d 724, 726 (Tex. Civ. App., 1944); *United States* v. *Clark*, 5 Utah 226, 231, 14 Pac. 288, 291 (1887); *Jones* v. *City of Seattle*, 51 Wash. 245, 248–249, 98 Pac. 743, 745 (1908); *Wyuta Cattle Co.* v. *Connell*, 43 Wyo. 135, 143–144, 299 Pac. 279, 281 (1931).

usual sense, and with the meaning commonly attributed to them." *Caminetti* v. *United States*, 242 U. S. 470, 485–486. See also, *e. g.*, *Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552, 560; *Crane* v. *Commissioner*, 331 U. S. 1, 6; *National Labor Relations Board* v. *Coca-Cola Bottling Co.*, 350 U. S. 264, 268–269. There is clearly no reason for applying a different rule in construing congressional resolutions.

But if Senator Watkins' power as a one-member quorum to "tak[e] sworn testimony" included as a normal incident thereto the power to receive subpoenaed documents (as it clearly did, for the reasons and under the authorities above set forth), it also included the authority to entertain and pass upon objections to the production of subpoenaed documents, for the same reason that it surely included the power to entertain and pass upon objections to the requiring of oral testimony.

Judge Fahy, it is to be noted, does not suggest in the above-quoted (p. 60) passage of his opinion that a single Senator or Congressman in whom there had been lodged the authority to take sworn testimony would lack the power—normally incident to that authority—to pass upon a witness' objections to propounded questions. *Watkins* itself would seem to recognize that in such a situation the single Senator or Congressman would possess this power: "To carry out this mission [*i. e.*, of obtaining facts upon which the full legislature can act], committees and subcommittees, *sometimes one Congressman*, are endowed with the *full power* of the Congress to compel testimony" (354 U. S. at 200–201, emphasis added).

Indeed, it cannot be supposed that it was the intent of the Senate, in authorizing one-man committee quorums for the purpose of taking sworn testimony, to require, if a witness objected to a question, that the committee member conducting the hearing adjourn the hearing, summon the full committee (or a regular quorum thereof) to pass upon the objection, and then resume the hearing—only to have to repeat the process each time the witness objected to a question. Obviously it was the Senatorial intent to permit the one-member quorum to pass upon objections to questions himself, as an incident of his power to conduct the hearing. For, "[t]he power to take testimony necessarily implies the requisite authority to compel a witness to answer pertinent questions" (*United States* v. *Aiuppa*, 102 F. Supp. 609, 611 (N. D. Ohio), reversed on other grounds, 201 F. 2d 287 (C. A. 6)[27]). But, by the same token, if to receive subpoenaed documents is a normal incident of the taking of testimony (as we have argued it is), the one-member quorum possesses also the authority, as an incident of his general power to conduct the hearing and take sworn testimony, to entertain and pass upon objections to the production of such documents. The self-same considerations apply to either situation.

3. If, however, contrary to the contention advanced above, it was the intent of the Senate to have the full Subcommittee pass upon such objections, petitioner

[27] This decision rejected a contention that "a subcommittee of one"—which was concededly authorized to "take testimony"—was "without authority to direct the witness to answer the questions" (102 F. Supp. at 611).

failed properly to raise the issue of the absence of a quorum to rule upon his objections, with the consequence—see *United States* v. *Bryan*, 339 U. S. 323, 332–334—that the point was waived and was not available to petitioner at his trial (cf. *United States* v. *Fleischman*, 339 U. S. 349, 352).

While petitioner raised a point of "no quorum" at the outset of his appearance before the Subcommittee (R. 38–39), he made no distinction between a quorum for the purpose of taking testimony and a quorum for the purpose of ruling upon his objection to the production of the subpoenaed records.[28] Senator Watkins, in overruling his "no quorum" objection, simply advised him that "[u]nder our rules, * * * one present makes a quorum" (R. 38). By failing to make a "no quorum" objection specifically addressed to the question of the power of the one-member Subcommittee to rule upon an objection to the production of subpoenaed documents, petitioner failed to give Senator Watkins an opportunity to consider that specific objection. It is possible that the Senator, had

[28] In his prepared statement delivered at the outset of consideration of the membership list question at the hearing (R. 41), petitioner said, "I am confident that the members of this committee, after considering my views and after a study of the full implications of the request made in this subpena, will realize its conflict with the basic union tradition of this country now incorporated into Federal law and withdraw the demand for membership lists" (R. 42). In context this cannot be said to be, and petitioner does not contend it to be, a specific request for consideration of the objection by the full subcommittee. Although the statement speaks of "members" in the plural, it was prepared in advance, presumably before petitioner knew how many Senators would attend the session.

such a specific objection been made, might have reserved for the full Subcommittee the question of petitioner's substantive objections to production, thereby eliminating the "quorum" point from the case. Compare the discussion, *infra*, pp. 69–71, of the necessity, under *Watkins*, of the making of an objection on pertinency grounds to a question whose pertinency is not entirely clear, so as to give the committee the opportunity to explain pertinency.

If, therefore, the Senate Resolution is to be interpreted as petitioner contends, he is in no better position since he failed to object to the absence of a quorum in the manner which *his* interpretation of the Resolution would require.

4. Petitioner emphasizes that "a single Senator" insisted on compliance by petitioner with the terms of the subpoena (Br. 47, 52), and implies that there is danger of abuse if the Senate Rules are construed as authorizing one-man committee quorums to pass upon a witness' objections to the production of subpoenaed records. However, petitioner's objections were necessarily considered by the Subcommittee as a whole as well as by the parent Committee on the Judiciary,[29]

[29] Petitioner's contumacy was reported by the Internal Security Subcommittee to the parent Committee on the Judiciary, which in turn reported the matter to the Senate (S. Rept. No. 1336, 82d Cong., 2d sess., to accompany S. Res. 295). At least a majority of the Committee on the Judiciary was required to take this action. See Section 133 (d) of the Legislative Reorganization Act of 1946, 60 Stat. 831 (Appendix, *infra*, p. 87, fn. 2), providing that "No measure or recommendation shall be reported from any such [standing] committee [of the Senate or House] unless a majority of the committee were actually present." [cont.]

and action by the Senate itself was required to certify the fact of petitioner's contempt to the United States Attorney for prosecution in accordance with law.[30] Furthermore, the record indicates that the Subcommittee members kept in constant touch with one another in regard to matters affecting Subcommittee affairs, particularly with respect to questions as to who would be subpoenaed (R. 55–58, 60); and, in addition, the subpoena was signed by the Chairman of the Subcommittee (G. Ex. 5, R. 63–64; R. 53) under the power conferred upon him by the authorizing resolution (see Section 2 of S. Res. 366, 81st Cong., 2d sess.; Appendix, *infra*, pp. 86–87).

V. The fact that petitioner was not in terms informed of the basis of pertinency of the records demanded is immaterial since he made no objection on grounds of pertinency

Petitioner argues (Br. 33–38) that "the conviction must be set aside because petitioner was not informed of the pertinency of the records demanded" (Br. 33). There is no merit to the argument. The fact that petitioner was not in terms informed by the Subcommittee of the basis of pertinency of the membership lists to the subject under inquiry is immaterial since he

[fn. 29 cont.]

Rule XXV (3) (a) of the Standing Rules of the Senate (Appendix, *infra*, p. 87), in authorizing each standing committee to fix the number of its members (in excess of one-third of its entire membership) who shall constitute a quorum for the transaction of its general business, specifically makes the provision "subject to the provisions of" said Section 133 (d) of the Legislative Reorganization Act of 1946.

[30] See Senate Resolution 295, 82d Cong., 2d sess. (1952), agreed to at 98 Cong. Rec. 2500, directing the President of the Senate to certify the report of petitioner's contempt to the United States Attorney for the District of Columbia.

made no objection on grounds of pertinency. And, as we have previously argued (Point III, *supra*, pp. 52–58), the grounds of pertinency were in fact clear.

In *Watkins*, this Court held that, since it is of the essence of the offense defined by 2 U. S. C. 192 that the question or questions which the witness has been asked and has refused to answer have been "pertinent to" the subject under inquiry by the committee, due process demands that, "*[u]nless the subject matter has been made to appear with undisputable clarity*" (from the totality of the circumstances attending the asking of the question, including the terms of the committee's authorizing resolution), and "*upon objection of the witness on grounds of pertinency,*" he be clearly apprised, at the time his answers are demanded, "what the topic under inquiry is and the connective reasoning whereby the precise questions asked relate to it" (354 U. S. at 214–215; emphasis added).

The importance of the requirement that there be a specific objection by the witness on grounds of pertinency is emphasized by the fact that the *Watkins* decision has a footnote appended to the pertinent passage of the opinion,[21] as follows: "Cf. *United States* v. *Kamin*, 136 F. Supp. 791, 800." The *Kamin* opinion emphasized the necessity of a specific objection

[21] The passage reads: "Unless the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body, upon objection of the witness on grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto" (354 U. S. at 214–215).

grounded on pertinency as follows (136 F. Supp. at 800):

> The defendant contends that it is not enough for a question to be pertinent—the witness must be informed of the subject matter, so that he may have a definite standard by which to determine whether he should answer. *Because if he was not so informed he admittedly indicated no interest, and did not choose to supplement any deficiency in his knowledge by asking either the Chairman or his own counsel, I regard this contention as immaterial.* * * * [Emphasis added.]

See also *Barenblatt* v. *United States*, 252 F. 2d 129, 134 (C. A. D. C.), pending on writ of certiorari, No. 35, this Term; *United States* v. *Miller*, 152 F. Supp. 781, 790 (D. D. C.), reversed on other grounds, August 7, 1958 (C. A. D. C.).

Thus, at the heart of the *Watkins* holding is the requirement that the witness, in order successfully to defend against a charge of willful refusal to answer questions or comply with a subpoena, must have raised the issue of lack of pertinency, by appropriate objection, at the time he was called upon to answer the questions or to produce the documents. This is a proper qualification since the purpose of the requirement is to give the committee the opportunity to explain to the witness the logical nexus between the answer or document sought and the subject of inquiry, in the event that the nexus was not "undisputabl[y]" clear already. Similarly, this Court, in *United States* v. *Bryan*, 339 U. S. 323, 333, held that a contumacious witness before a congressional committee could not

raise the objection of a lack of a quorum for the first time at her trial since the defect "could have been rectified in a few minutes." Furthermore, "[t]o deny the Committee the opportunity to consider the objection or remedy it is in itself a contempt of its authority and an obstruction of its processes." *Ibid.* Accord, *United States* v. *Fleischman*, 339 U. S. 349, 352.

That petitioner never objected at the Subcommittee hearing to the production of the union's membership lists on grounds of lack of pertinency to the inquiry's subject is clear, we believe, from a reading of the transcript (R. 41–50). Petitioner's attempt to squeeze from the record of the actual objections which he made at the hearing an objection based on grounds of pertinency (Br. 35–37), is patently unsuccessful. His remarks at the hearing in objecting to being required to produce the membership lists, distilled to their essence, amounted to no more than an objection on the ground that compulsory production would constitute an invasion of the union's and union members' right of privacy.[22] But this was not equivalent to objecting on grounds of pertinency, any more than invoking one's privilege against self-incrimination is equivalent to objecting on grounds of pertinency. In each case the objection proceeds on the basis of an overriding constitutional right which it is claimed must be honored irrespective of pertinency. The ob-

[22] As we have previously noted (fn. 20, *supra*, p. 53), the fact that the committee did not formally and in so many words repudiate petitioner's charge that the purpose in subpoenaing the lists was to use them as "blacklists" cannot reasonably be distorted, as petitioner attempts to do (Br. 35–36), into acknowledgment by the committee that such was its purpose.

jection indeed assumes pertinency. Petitioner, significantly, in articulating the basis of his objection in the prepared statement which he read to the committee, specifically referred to the Fourth Amendment (R. 42). A claim that evidence should be excluded or suppressed because seized in violation of the Fourth Amendment is an entirely different thing from claiming that it should be excluded because of lack of pertinency. Frequently, it is precisely because the evidence in question is pertinent that it is so vital from the movant's standpoint that it be suppressed.

Nor is there any reason for loosely treating the actual objections which petitioner made as a raising of the issue of lack of pertinency. For petitioner knew very well how to object to a question on grounds of lack of pertinency when he desired to, as the record of his later remarks before the committee reflects.[33]

The only instance to which petitioner can point in which he referred to pertinency or relevancy in connection with the membership records (see Br. 36) is a brief colloquy which he had with Senator Watkins (see *supra*, pp. 14–15) in which the Senator, appar-

[33] Queried as to who the members of the executive board of the union were, petitioner asked what the "relevance" of these names was to the committee's investigation and how the giving of names "would assist this committee in preparing legislation or enforcing it" (Hearings before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, United States Senate, 82d Cong., 1st sess., on *Subversive Control of the United Public Workers of America*, Part I, July 27, August 9, 23, 25 and 29, September 28, October 5 and 10, December 14, 1951, pp. 76, 77). After further colloquy, petitioner gave the names (*id.*, p. 77).

ently in reply to a suggestion by petitioner that the only use to which the records could be put would be "as blacklists," said (R. 49):

> May I direct your attention to the fact that this is an executive session and the records are not public here unless the order of the committee is to make them public. But at least for the present the records are to be delivered to the committee in executive session.

To this, petitioner replied as follows (R. 50):

> Sir, on that I don't see any good purpose that these records would serve, even if I were to produce them. I think they are wholly irrelevant, if you say they are not to be made public.

In its context, this reference by petitioner to relevancy can hardly be construed, we submit, as a raising of the issue of pertinency in the sense contemplated by *Watkins*. Petitioner's point apparently was merely that unless the records sought were made public (as distinguished from production in executive session, solely for the committee's use), they would be "irrelevant," *i. e.*, useless, as potential "blacklists"—the use to which petitioner gratuitously had charged the committee with intending to put the records. As noted by Judge Prettyman, "In using the word 'irrelevant' Flaxer was merely expressing his view of a presentation in private. The only meaning reasonably inferrable from his answer is that if not made public the records were irrelevant" (R. 118).

In any event, so vague and ambiguous a statement can hardly be said to have put the committee on notice

that the issue of pertinency was being raised.[34] The rule is well settled that the exact nature of an objection to the receipt of evidence at a trial must be made clear at the trial to be availed of on appeal, and that a vague objection such as that offered evidence is "immaterial, irrelevant, and incompetent" will not be permitted to do service for an objection of a specific character which, if sound, could possibly have been obviated at the trial. As this Court stated in *Noonan* v. *Caledonia Mining Co.*, 121 U. S. 393, 400:

> The rule is universal, that where an objection is so general as not to indicate the specific grounds upon which it is made, it is unavailing on appeal, unless it be of such a character that it could not have been obviated at the trial. The authorities on this point are all one way. Objections to the admission of evidence must be of such a specific character as to indicate distinctly the grounds upon which the party relies, so as to give the other side full opportunity to obviate them at the time, if under any circumstances that can be done.[35]

For the same reason, the obscurely worded statement of petitioner, *supra*, on which he now relies cannot be accepted after the event as an adequate raising of the issue of lack of pertinency.

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[34] Compare the explicit objection of the petitioner in *Watkins* which this Court found had raised the issue of lack of pertinency. 354 U. S. at 185.

[35] See also, *e. g.*, *Duncan* v. *United States*, 68 F. 2d 136, 140 (C. A. 9), certiorari denied, 292 U. S. 646; *Yaffee* v. *United States*, 276 Fed. 497, 501 (C. A. 6), certiorari dismissed, 259 U. S. 590.

Finally, even if it be assumed *arguendo* that petitioner did adequately raise the issue of lack of pertinency, his argument is not thereby helped. For *Watkins* recognizes that raising the issue of pertinency has relevance only where the subject matter of the inquiry and the pertinency thereto of the question asked or document demanded have not already "been made to appear with undisputable clarity" (354 U. S. at 214) from the totality of the attendant circumstances, including but not at all limited to the terms of the committee's authorizing resolution (*id.* at 208–215). For the reasons previously advanced (see *supra,* pp. 52–56), both the subject of inquiry and ~~the~~ the rational connection between it and the records sought had been made to appear with the requisite degree of clarity in this case. And the record reflects, furthermore, that petitioner was well aware of both. As noted by Judge Prettyman, "Flaxer's responses to questions demonstrated that he knew what the subject of the inquiry was. In response to the subpoena he produced the financial and various other records of his union and, without objecting, presented them to the Committee on the record. He thus indicated that he recognized the nature of the question under inquiry. He refused to produce the membership lists but not upon the ground they were not pertinent. He objected on the ground that the Government as an employer is not entitled to know which of its employees belong to unions * * *" (R. 117).

VI. Petitioner was clearly ordered to produce the subpoenaed records pursuant to the subpoena; his reliance on the *Quinn* decision is, accordingly, misplaced

Petitioner's final argument (Br. 52–54) is that his conviction cannot be sustained in the light of this Court's holding in *Quinn* v. *United States*, 349 U. S. 155, 165–166,[36] that "unless the witness is clearly apprised that the committee demands his answer notwithstanding his objections, there can be no conviction under § 192 for refusal to answer that question"[37] (*id.* at 166).

He argues (a) that, although he was (concededly) ordered at the October 5th hearing to produce the membership lists *after* the committee had heard his objections, the net effect of the colloquy which followed was that the committee abandoned its insistence that he produce the lists under that order and, instead, granted him an additional ten days' grace within which to produce them (Br. 52–53, 54), and (b) that the fact that he did not produce the lists within this grace period either (and in fact never produced them) is immaterial to the validity of his conviction for refusing to produce them on October 5th—the offense charged (Br. 53). We contend, on the other hand, that the record supports the jury's finding (and the Court of Appeals' view) that petitioner committed a completed contempt on October 5th, even though the

[36] See also *Emspak* v. *United States*, 349 U. S. 190, 202; *Bart* v. *United States*, 349 U. S. 219, 222–223.

[37] While *Quinn* involved a refusal to answer questions, it is not disputed that its rationale is equally applicable to a refusal to produce documents pursuant to a subpoena *duces tecum*.

committee, in a new order, thereafter directed him to produce the lists within ten days from that date.

1. As indicated in the Statement (*supra*, pp. 10–13), and as pointed out in the original majority opinion of the Court of Appeals (R. 99–100), the committee, after having been fully apprised by petitioner of his objections to producing the membership lists in accordance with the terms of the subpoena, told petitioner (R. 47, 100):

> You are directed by the committee to produce those records according to the terms of the subpena.

Thus, as noted by the Court of Appeals, "[a]fter consideration of his objections to the validity of the subpoena, Flaxer was unmistakably directed to produce the membership list" (R. 99). The rule of the *Quinn* case, *supra*, was clearly complied with. Petitioner knew that his objections had been considered and overruled, and that he was being ordered to produce the records demanded notwithstanding those objections. Consequently, petitioner's reliance and that of dissenting Judges Edgerton and Bazelon (R. 110–113, 120) on the *Quinn* case is, we submit, misplaced.[35]

It is true that petitioner, after further colloquy with the committee, was ordered to produce the rec-

[35] *United States* v. *Kamp*, 102 F. Supp. 757 (D. D. C.), which petitioner says involved a "substantially identical" factual situation (Br. 54), is, on the contrary, clearly distinguishable. As the opinion in that case makes clear (at 759), the committee never overruled the witness' objections to producing the records called for by the subpoena, and never ordered him to produce after he had made his objections.

ords within ten days from that date (*supra*, pp. 14–15; R. 50). But at no time did the committee suggest that it had rescinded its original order, or that petitioner's original refusal to produce had been excused. The later order of the committee is entirely explainable on the ground that, being vitally concerned with obtaining the records sought, it was making a fresh attempt to do so. As observed by the Court of Appeals (R. 101),

> It was not until after the appellant had been directed, despite his protest, to produce the records according to the terms of the subpoena, that the chairman ordered him to assemble the information and transmit it to the subcommittee in ten days. Obviously this was because the subcommittee still wanted the information which had been contemptuously withheld from it at the hearing. But the chairman nowhere receded from his earlier ruling that the subpoena was to be complied with, which ruling was given after the witness had said he did not have the records with him. Senator Watkins said nothing which can be construed as excusing or condoning Flaxer's contempt—already complete—in disobeying the subpoena. [Footnote reference omitted.]

2. To be sure, it is unlikely that petitioner would have been cited for his contempt of October 5th if he had obeyed the committee's second order—to produce the records within ten days. In that event, he could be considered to have accepted in effect an opportunity, extended to him by the committee, to purge himself of his initial contempt. But since petitioner did

not in fact produce the records within the ten-day period (or, indeed, at any time), there is no need to theorize as to what the legal effect would have been of compliance by petitioner with the second order.[39] As noted by the Court of Appeals (R. 101–102):

> If Flaxer had demonstrated good faith by compiling the membership records and sending them to the subcommittee within ten days, perhaps he would not have been indicted for his initial contempt. On that supposition some may think Senator Watkins—although he did not promise immunity in that event—was affording Flaxer an opportunity to purge himself of contempt. If so, it was an opportunity the appellant did not embrace. He remained recalcitrant, thus affirming and emphasizing the contempt he had originally displayed. That he may have committed another contempt in addition to that of October 5 would seem to be irrelevant.

See also the remarks of the trial judge at R. 16–17.

3. The jury was instructed, at petitioner's request, that (R. 91–92)

> * * * you cannot find that the defendant willfully and deliberately refused to produce the records called for by the subpoena unless you first find that the defendant clearly understood

[39] Since, under *Yates* v. *United States*, 355 U. S. 66, 73, "the prosecution cannot multiply contempts by repeated questioning on the same subject of inquiry within which a recalcitrant witness already has refused answers," it would appear that petitioner's continued refusal to produce the membership lists constituted a single contempt. All that took place after October 5th, therefore, was that petitioner, already in contempt, continued in that status.

that the subcommittee had rejected the arguments advanced by the defendant and required him to produce the records on October 5, 1951, despite those arguments.

Whether the refusal and failure to produce was willful must be determined as of the time that the failure and refusal took place, and that time is specified in the indictment as October 5, 1951. What happened later is immaterial and has no bearing upon the issues of this case except as it may reflect on what the defendant did on October 5, 1951; that is, whether there was a refusal or was not a refusal to produce the records on October 5th, and if there was a refusal, whether the refusal was willful or otherwise.

Thus, implicit in the verdict of guilty was a finding by the jury that petitioner knew he had been ordered to produce the records on October 5th and deliberately refused to do so. Since a jury's verdict must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it (*Glasser* v. *United States*, 315 U. S. 60, 80; *United States* v. *Manton*, 107 F. 2d 834, 839 (C. A. 2), certiorari denied, 309 U. S. 664), it is submitted that on the basis of this record the jury's finding on this issue must be accepted as dispositive.

VII. Since petitioner deliberately disabled himself from producing the membership lists by not bringing them to the hearing, thereby evidencing his intent not to produce them under any circumstances, he had no standing at his trial to rely upon grounds for refusal to produce which were related solely to events occurring at the hearing

In Points IV, V, and VI, *supra*, pp. 59–68, 68–75, 76–80, we have answered, on their merits, petitioner's contentions that his conviction must be set aside be-

cause of events which did or did not take place at the hearing itself. There is, however, a basic reason why none of these grounds was properly available to petitioner at his trial and why, consequently, none needs to be considered by this Court at this time.

That reason is the fact that none of these grounds was the basis for petitioner's refusal to produce the records. Petitioner was served with the subpoena calling for these records on September 19, 1951 (R. 37). He appeared before the Subcommittee on the return date, which was October 5, 1951 (R. 36, 37). The time which elapsed between these dates was, by petitioner's own admission, more than enough to have enabled him to prepare the called-for membership lists.[40] But petitioner took no steps towards assembling the lists requested and appeared before the committee on the return date without them (R. 39, 42, 47). He thought the committee's demand for the lists was "an improper command," he told the committee; "That is the reason I haven't got them" (R. 47). In other words, petitioner, deliberately and in advance, rendered himself unable to comply with the terms of the subpoena, thus evidencing his intent not to produce the lists under any circumstances. In the words of the Court of Appeals (R. 101):

> He deliberately refrained from making the compilation, from which it is apparent that he had decided in advance he would not obey in any circumstances.

[40] Petitioner testified at the hearing that the data could be assembled within a week's time (R. 49).

Even if, to petitioner's satisfaction, the full Subcommittee had been at the hearing (Point IV), and had fully explained to him exactly how the lists were pertinent to the subject under inquiry (Point V), and had categorically directed that he deliver the subpoenaed lists then and there (Point VI), he would still have refused to do so—indeed could not have done otherwise in view of his failure to equip himself in advance—because, having regarded the demand as an "improper command," he had made up his mind not to comply with this portion of the subpoena under any circumstances although he complied with other portions of the subpoena.

This being the posture of the case at the time of petitioner's trial, the Government contends, on the authority of *United States* v. *Bryan*, 339 U. S. 323, that none of the three above-mentioned grounds was properly available to him at his trial or need be considered now. In other words, petitioner was validly found guilty of contempt regardless of what possible merits any of the foregoing grounds might have had if they had been the true basis of petitioner's refusal since he had made clear that he would refuse to produce the membership lists in any event.

Bryan held (339 U. S. at 327–335) that a witness who, having been subpoenaed to appear and produce records before a congressional committee, appears but refuses to produce the records, may not, on his subsequent trial for willful default, defend on the ground that a quorum of the committee was not present when the default occurred—he having not relied on the absence of a quorum at the time of his appearance be-

fore the committee and as a reason for his default, and it being apparent that he "would not have complied with the subpoenas no matter how the Committee had been constituted at the time" (at 333–334). "Here respondent would have the Committee go through the empty formality", the Court observed in rejecting Bryan's argument, "of summoning a quorum of its members to gather in solemn conclave to hear her refuse to honor its demands" (at 334). See also *United States* v. *Kamin,* 136 F. Supp. 791, 793–794 (D. Mass.).

Bryan cited two earlier decisions of this Court, *Hale* v. *Henkel,* 201 U. S. 43, and *Bevan* v. *Krieger,* 289 U. S. 459. In the *Hale* case, the witness had based his refusal to produce documents on three grounds, one of which was that it was "impossible for him to collect them within the time allowed" (201 U. S. at 70). The Court indicated that it would not consider this objection because, "[h]ad the witness relied solely upon [this] ground, doubtless the court would have given him the necessary time" (*ibid.*). In *Bryan,* this Court, alluding to this holding of the *Hale* case, observed (339 U. S. at 334):

> [H]aving refused compliance for other reasons which the lower court could not remedy, the witness could not later complain of its refusal to do a meaningless act—to grant him additional time to gather papers which he had indicated he would not produce in any event.

In the *Bevan* case, this Court, observing that a witness' declaration that he "would answer no further questions" would "in any court * * * be sufficient

ground for his commitment without further or other hearing," said that "[s]uch an attitude indicates no desire for a hearing upon the propriety of the questions, but on its face constitutes a contempt" (289 U. S. at 465).

The *Bryan, Hale,* and *Bevan* cases thus stand for the proposition that a witness' objections to questions or to demands for production should be considered by the courts only where it appears that he would have answered the questions or produced the records but for those objections, and they make clear that this Court will not reverse a conviction for contempt on a ground which was not the real basis for the witness' refusal to answer or to produce.

Here, as in *Bryan,* petitioner relied solely upon a ground for refusing to produce which the Subcommittee could not have cured—*i. e.,* the asserted right of a union to keep its membership list private. He accordingly, as in *Bryan,* had no standing at his trial—and has none now—to rely upon grounds for refusal to produce which were not his true grounds.

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Statute, Resolution, and Rule Involved

2 U. S. C. 192 (Rev. Stat., § 102, as amended) provides:

> Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

Senate Resolution 366, 81st Cong., 2d sess., adopted December 21, 1950 (96 Cong. Rec. 16872; see also R. 32–33), provides in pertinent part:

> Whereas the Congress from time to time has enacted laws designed to protect the internal security of the United States from acts of espionage and sabotage and from infiltration by persons who seek to overthrow the Government of the United States by force and violence; and
>
> Whereas those who seek to evade such laws or to violate them with impunity constantly seek to devise and do devise clever and evasive means and tactics for such purposes; and
>
> Whereas agents and dupes of the world Communist conspiracy have been and are engaged in activities (including the origination

and dissemination of propaganda) designed and intended to bring such protective laws into disrepute or disfavor and to hamper or prevent effective administration and enforcement thereof; and

Whereas it is vital to the internal security of the United States that the Congress maintain a continuous surveillance over the problems presented by such activity and threatened activity and over the administration and enforcement of such laws;

Resolved, That the Committee on the Judiciary, or any duly authorized subcommittee thereof is authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence.

SEC. 2. The committee, or any duly authorized subcommittee thereof, is authorized to sit and act at such places and times during the sessions, recesses, and adjourned periods of the Senate, to hold such hearings, to require by subpenas or otherwise the attendance of such witnesses and the production of such books, papers, and documents, to administer such oaths, to take such testimony, to procure such printing and binding, and, within the amount appropriated therefor, to make such expenditures as it deems advisable. * * * Subpenas shall be

issued by the chairman of the committee or the subcommittee, and may be served by any person designated by such chairman.

A majority of the members of the committee, or duly authorized subcommittee thereof, shall constitute a quorum for the transaction of business, except that a lesser number, to be fixed by the committee, or by such subcommittee, shall constitute a quorum for the purpose of administering oaths and taking sworn testimony.

* * * * *

Rule XXV (3) of the Standing Rules of the Senate, as amended by Senate Resolution 180, 81st Cong., 2d sess., adopted February 1, 1950 (96 Cong. Rec. 1284; see also R. 31), provided at the time pertinent hereto (October 5, 1951) [1]:

(3) (a) Except as provided in paragraph (b) of this subsection, each standing committee, and each subcommittee of any such committee, is authorized to fix the number of its members (but not less than one-third of its entire membership) who shall constitute a quorum thereof for the transaction of such business as may be considered by said committee, subject to the provisions of section 133 (d) of the Legislative Reorganization Act of 1946.[2]

(b) Each standing committee, and each subcommittee of any such committee, is authorized to fix a lesser number than one-third of its entire membership who shall constitute a quorum thereof for the purpose of taking sworn testimony.

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[1] Unless changed, the rules of one session of the Senate carry over into the next (R. 35).

[2] Section 133 (d) of the Legislative Reorganization Act of 1946 (60 Stat. 831) provides:

"(d) No measure or recommendation shall be reported from any such [standing] committee [of the Senate or House] unless a majority of the committee were actually present."

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